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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1002

KERRY M. GOUGH, Trustee in Bankruptcy of LOUIS ROSEN dba WALNUT CREEK FURNITURE,
Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET AND DRAPERY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Citations to opinions below	1
Questions presented	3
Statutes involved	5
Statement of the case	5
A. The trial	5
1. The parties	5
a. Defendants	5
b. Persons	7
c. Plaintiff	9
2. Relevant market	9
3. The conspiracy in restraint of and in monopolization of trade	10
a. Coercive means were used to further the conspiracy	13
4. Effect of conspiracy	13
B. Course of the proceedings	14
C. Changing defenses of the defendants	19
The reasons for granting the writ	20
I. This court should review decisions which apply doctrines to exempt conspiracies in restraint of trade from the Sherman Act	20
A. The relevant market need not be shown in a hard core section 1 conspiracy case since Congress has prohibited the entry into coercive conspiracies whose purpose and object is to suppress or exclude competition in any appreciable part of interstate commerce	20
1. The Sherman Act prohibits the entry into a conspiracy to prevent interbrand competition in any appreciable part of interstate commerce	20
B. This court has heretofore resisted all efforts to shift judicial attention away from the purposes, scope and means of the conspiracy to suppress competition	24
C. The means used by the conspiracy here are also in per se violation of the Act	26
1. The refusal to deal was a per se violation	26

SUBJECT INDEX

	Page
2. Repondents were effecting a stay out of Rossmoor policy	27
3. The respondents were fixing prices	28
D. Competition in a $50,000,000 retirement community is subject to judicial protection under § 2 of the Sherman Act	29
1. A community is a significant part of commerce under section 2	29
2. Relevant market is definable in terms of where sellers seek to compete	30
3. The barriers erected by sellers may define a relevant market	30
E. Relevant market is not a test when conspiracy or attempt to monopolize is in issue	31
F. Relevant market does not allow the appellate court to order judgment for the respondents	32
II. This court should enforce rules which prevent litigants from urging as error their own submission or offers	33
A. Litigants are estopped from obtaining the benefits of their own errors	33
B. In any event, judgment n.o.v. cannot be entered for defendants because they failed to make a motion within 10 days after the findings of the jury	36
III. Judgment cannot be enforced when based on an appellate court entering findings of fact contrary to the trier of fact	36
IV. The opinion in Gough III violates the doctrine of law of the case	40
Conclusion	41

TABLE OF AUTHORITIES CITED

Cases

	Page
Albrecht v. Herald Co., 390 U.S. 145 (1968)	22
Associated Press v. United States, 326 U.S. 1 (1945)	21, 24
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)	38
Binderup v. Pathe Exchange, 263 U.S. 291 (1923)	22, 24
Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918)	32
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	30
Cataphote Corp. v. DeSoto Chem. Coatings, Inc., 450 F.2d 769 (9th Cir. 1971), cert. denied, 408 U.S. 929 (1972)	35
Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212 (1947)	36
Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	21, 22, 27
De Voto v Pacific Fidelity Life Ins. Co., 516 F.2d 1 (9th Cir. 1975)	22
Donnelly Garment Co. v. N.L.R.B., 123 F.2d 215 (8th Cir. 1942)	40
Eastern States R.L.D. Associates v. United States, 234 U.S. 600 (1914)	24
Fashion Originators' Guild of America v. Federal Trade Commission, 114 F.2d 80, affirmed, 312 U.S. 457 (1941)	21
Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296 (9th Cir. 1978)	22, 28, 35
Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952)	30, 31
Globe Liquor Co. v. Roman, 332 U.S. 571 (1948)	36
Gough I, Rosen v. Rossmoor Corporation, 487 F.2d 373 (9th Cir. 1973)	2, 20, 22, 30, 33, 40
Gough II, Gough v. Rossmoor Corporation, 533 F.2d 453 (9th Cir. 1976) cert. denied 429 U.S. 857	2, 40
Gough III, Gough v. Rossmoor Corporation, unreported, .. F.2d .. (9th Cir. 1978), 1978-2 Trade Cases, ¶ 62, 202	1, 2, 23, 36, 40
Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976)	22
In re Carmona, 224 F.Supp. 497 (S.D. Ca. 1963), affirmed, 336 F.2d 518 (9th Cir. 1964)	40

Table of Authorities Cited

Cases

	Page
International Salt Co. v. United States, 332 U.S. 392 (1947)	21
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	21, 25, 26
Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977)	35
Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964)	32
Lorain Journal v. United States, 342 U.S. 143 (1951)	27, 29, 31, 39
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948)	21
May Department Stores v. Reynolds, 140 F.2d 799 (8th Cir. 1944)	40
Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977)	35
National Society of Professional Engineers v. United States, .. U.S. .., 98 S.Ct. 1355 (1978)	22
Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967)	36
Pfizer, Inc. v. Government of India, .. U.S. .., 98 S.Ct. 584 (1978)	23
Quemos Theatre Co. v. Warner Bros. Pictures, 35 F.Supp. 949 (D.C.N.J. 1940)	22
Radovich v. National Foootball League, 352 U.S. 445 (1957)	23, 25, 26
Ronald Fabrics Co. v. Verney Brunswick Mills, Inc., 152 F. Supp. 136 (D.C.N.Y. 1946)	22
Roth v. McAllister Bros., Inc., 316 F.2d 143 (2d Cir. 1963)	35
Scarano v. Central Ry. Co. of New Jersey, 203 F.2d 510 (3d Cir. 1953)	35
Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)	21
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)	37
Swift & Co. v. United States, 196 U.S. 375 (1905)	32
United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956)	31

Table of Authorities Cited

Cases

	Page
United States v. First National Pictures, Inc., 282 U.S. 44 (1930)	24
United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941) 404	22
United States v. General Motors Corp., 234 F.Supp. 85, rev'd, 384 U.S. 127 (1966)	22, 23, 26
United States v. Griffith, 334 U.S. 100	30, 31
United States v. Kissel, 218 U.S. 601 (1910)	22
United States v. Marine Bancorporation, 418 U.S. 602 (1974)	30
United States c. Socony Vacuum Oil Co., Inc., 310 U.S. 150 (1940)	22
United States v. TopCo Associates, 450 U.S. 596 (1972)	26
United States v. Yellow Cab Co., 332 U.S. 218 (1948)	31, 32
Walker Process Eqpt. Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172 (1965)	31
White Motor Co. v. United States, 372 U.S. 253 (1963)	22
William Goldman Theatres v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945)	22, 30
Wood v. United Air Lines, 216 F.Supp. 340 (E.D.N.Y. 1963)	35
Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971)	30, 31
Zenith Radio Co. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	35

Constitutions

United States Constitution, Amendment VII	37

Rules

Federal Rules of Civil Procedure:	
Rule 49	15
Rule 50(b)	4

Statutes

	Page
12 U.S.C.:	
Section 1702	5
Section 1715(e)	5
15 U.S.C. Section 1	5
Section 2	5
Section 15	5
Clayton Act:	
Section 4	4, 5, 15
Section 7	28
Sherman Act:	
Section 1	3, 5, 34
Section 2	3, 5, 29, 34

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

Kerry M. Gough, petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 9, 1978, petition for rehearing denied on October 27, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Honorable United States Court of Appeals for the Ninth Circuit reversing the judgment of the trial court on behalf of plaintiff is officially unreported and appears in 1978-2 Trade Cases, ¶ 62,202. It is attached

hereto as Appendix A. The order denying a petition for rehearing, for a hearing en banc and motion for a new trial is attached hereto as Appendix B herein. The judgment of the trial court, which was reversed, entered February 23, 1977, is attached hereto as Appendix C herein. The opinion of the trial court allowing judgment for petitioner herein filed February 23, 1977, is attached hereto as Appendix D. It is unreported.

The opinion below is the third opinion in this case and will be referred to from time to time as *Gough III*. The second opinion of the court of appeals is reported at 533 F.2d 453 (9th Cir. 1976), *cert. denied*, 429 U.S. 857. It will be referred to as *Gough II* and is attached hereto as Appendix E. The judgment in favor of petitioner which the opinion in *Gough II* reversed, entered November 4, 1974, as attached hereto as Appendix F. The opinion of the trial court in favor of petitioner, filed October 8, 1974 is attached hereto as Appendix G. The order of the District Court denying respondents' judgment n.ov. or motion for a new trial filed December 6, 1974, is attached hereto as Appendix H.

The opinion of the United States Court of Appeals for the Ninth Circuit reversing the judgment on behalf of respondents and entering judgment for petitioner is attached hereto as Appendix I. It will be referred to herein as *Gough I*. It is reported at 487 F.2d 373 (9th Cir. 1973).

The order of the panel in *Gough I*, entered December 28, 1973, changing the last paragraph of its opinion striking the entry for judgment for plaintiff and remanding the case to the trial court for further proceedings is attached hereto as Appendix J.

The judgment of the trial court for the respondents filed June 11, 1970 is attached hereto as Appendix K.

The jury's special findings in answer to interrogatories entered March 27, 1970 is attached hereto as Appendix L.

QUESTIONS PRESENTED

1. Whether a *per se* offense under § 1 of the Sherman Act exists when completely independent entities agree to exclude competition in the sale of carpets to purchasers of apartment units at a retirement community projected for 10,000 units, involving $20,000,000 sales, use the means of coercion to cause the refusal to allow carpet advertisements at competitive prices in the community newspaper upon independent newspapermen who fought the decision, fraud the purchasers of the apartments, prevent all competitive retailers from installing carpets prior to move-in, and deprive the plaintiff of sales to the purchasers of the apartments, the agreement being a substantial cause of his going out of business.

2. Whether *per se* offense under § 2 of the Sherman Act exists when businessmen with totally divergent business interests and duties toward the public agree to close off a multi-million dollar retirement community, financed by FHA commitments, from competition in the sale of carpets, when, as a group, they control access to the potential purchasers of carpets at the very time of the sale of the apartment units (manors).

3. Is the relevant market an indispensable element for proof of a restraint of trade under the rule of reason; and, if so, who has the burden of justifying the need of proof of the relevant market? If it is indispensable, can the

respondents attack their own statement in an appellate brief and their own interrogatories to the jury which define the relevant market to be the above mentioned retirement community.

4. Can the federal courts require an injured retailer suing under the provisions of § 4 of the Clayton Act for damages he proximately received from the impact of conduct designed to injure him to prove a relevant market in order to recover damages which every finder of fact has found to have been intentionally inflicted upon him by a conspiracy among the defendants in restraint of trade.

5. Can a planned and partially developed retirement community projected to be 10,000 newly built apartment units, a shopping center, recreational facilities, and possessing entrance and exit gates be a relevant market under the Sherman Act.

6. Can an appellate court, without violating the federal Constitution, make findings of fact directly in conflict with the findings of a jury or a trial court.

7. Can a litigant raise on appeal as error matters which attack his own theories and papers filed with the court as a ground to urge reversible error and cause such a reversal.

8. May a motion for *judgment n.o.v.* be raised for the first time in a petition for rehearing in an appellate court without a showing of compliance with Fed.R.Civ.P. 50(b).

9. May a second appellate court reverse the rulings of law entered by a prior appellate court in the same case.

STATUTES INVOLVED

The statutes involved are §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 4 of the Clayton Act, 15 U.S.C. § 15. These are printed and attached hereto as Appendix M.

STATEMENT OF THE CASE

A. THE TRIAL

1. The Parties

The action involves the effectuation of an agreement to eliminate competition in the sale of carpets and drapes at a retirement community located in Walnut Creek, California, financed by federal mortgage commitments pursuant to Sec. 312 of the National Housing Act. 12 U.S.C. Sec. 1715(e). In 1950 Section 213 (12 U.S.C. § 1715(e)) was added to the National Housing Act (12 U.S.C. § 1702). It was intended to meet the housing needs of middle income families and authorized the FHA to insure hundreds of millions of dollars of mortgage loans. See FEDERAL HOUSING ADMINISTRATION'S DECISION NOT TO REQUIRE BUILDERS' COST CERTIFICATIONS FOR ROSSMOOR LEISURE WORLD DEVELOPMENTS, REPORT TO THE CONGRESS, Feb. 19, 1969, Comptroller General of the United States, and QUESTIONS REGARDING LOAN INSURANCE CEILINGS AND LAND APPRAISALS FOR LARGE COOPERATIVE HOUSING COMMUNITIES, REPORT TO THE CONGRESS, Feb. 27, 1970, Comptroller General of the United States.

a. Defendants

Mr. Ross Cortese is President of Rossmoor Corporation. It is an owner of the land which it sells to the public as a part of a retirement community development. Rossmoor Corporation is the builder of the living units and com-

munity facilities for the public as stockholders of Mutual Corporations. It built the developments at Seal Beach, California; Wheaton, Md.; Cranbury, New Jersey; Laguna Hills, California and Walnut Creek, California (Pl. Ex. 1). By 1967 it had built eleven "Mutuals (multi-unit apartment houses called Manors owned by a cooperative corporation) at a cost of $47,427,000 at Walnut Creek (Pl. Ex. 1, Tr. 51).

Rossmoor Corporation is also a retailer of carpets and drapes through Crestmark Carpet and Drapery which it owns (Tr. 61). Crestmark's business is to sell carpets and draperies at the Rossmoor Leisure World Communities (Tr. 55-56, 945-973).

Leisure World Foundation was incorporated as the representative of the ownership group who must arrange extensive mortgage insurance financing with the FHA. It thus organizes the Mutuals and administers the community. It hires the sales staff to introduce the project to the buyer and sell shares of stock in the Mutual (Tr. 246, 546, 557, 360-362, 367-374). The Mutual is owned by the apartment house or manor buyers as stock holders of a corporation (Id.).

Leisure World Foundation enters into formal agency agreements with the Mutual Corporation creating a fiduciary relationship between it and the Mutuals (Pl. Ex. 33-2, Tr. 471).

As part of its agency functions, Leisure World Foundation operates a newspaper, the Leisure World News. In September, 1965, it printed at Walnut Creek 7,000 copies weekly, 5,500 of which are sent to future residents or prospective residents (Pl. Ex. 51, Tr. 306).

When 90% of the shares to a Mutual have been subscribed, contracts to build may be entered into between the Mutual and the contractor. Here all construction contracts were entered into with Rossmoor Corporation (Pl. Ex. 11, 122, 183, Tr. 48-50, 491-498). At the time of the entry into these contracts, agents of Leisure World are on the Board of Directors of the Mutual Corporation and sign the construction contracts (Pl. Ex. 11, 122, Tr. 401-407).

Significance attaches under FHA procedure whether the sponsorship group is owned by or affiliated with the builder. The agents of Leisure World Foundation for the Mutuals asserted by affidavit to the FHA that there existed no identity of interest between the Mutual Corporation whose Board of Directors at that time consisted of agents of Leisure World Foundation and Rossmoor Corporation (Id.). This affidavit, whose falseness constitutes a fraud on the United States, avoided the FHA requirement that Rossmoor Corporation submit actual construction costs to the FHA and be limited in its profits as a builder of a controlled housing project (Pl. Ex. 183, Tr. 411-416, Pl. Ex. 11, 122, Tr. 401-407; 12 U.S.C. § 1715r, Cr. 464-466).

Co-conspirator Golden Rain Foundation holds title to the community facilities at the Leisure World Community (Pl. Ex. 29, Tr. 475-476; Pl. Ex. 17, Tr. 222-223.

b. Persons

The President of Rossmoor Corporation is Ross Cortese. A vice president of Rossmoor who testified at the trial was Anthony Ceresa (Tr. 1027).

During the early period of Leisure World Foundation, its president was Mr. L. M. Letson (Tr. 377). Its president

then became Mr. W. G. Simon (Id.). For a short time following the end of 1965 or early 1966 its president was Mr. K. Belieu (Tr. 384-385).

Mr. E. L. Olsen was a secretary and Vice President of Leisure World Foundation (Tr. 382). Mr. Nelson, Administrator of Walnut Creek, reported to Mr. Olsen and Mr. Simon (Tr. 381-382). Mr. Robert Moon was a sales executive for Leisure World Foundation (Tr. 383) and for Rossmoor (Tr. 961-962).

Vera Moorman was Executive Editor of the Leisure World newspapers (Tr. 443; Pl. Ex. 37; Tr. 980-981). She was also employed by Rossmoor Corporation (Tr. 978-979, 1106-1107). Mr. Douglas J. Krauter was Director of Administration of Leisure World Foundation during the period March 1966 to November, 1966 (Tr. 544), and Systems Analyst for it from November, 1964 to March, 1966 (Id.).

During the period of time September, 1963 to August, 1966, Mr. Robert A. Nelson was the Administrator of the Rossmoor Leisure World Community, Walnut Creek (Tr. 355).

The editor of the Leisure World News, Walnut Creek, was Mr. John L. Ferris (Tr. 237). Carl Cronin was its advertising manager (Tr. 898).

Gerry Rathbun was sales coordinator between Crestmark and Leisure World Foundation Sales (Tr. 120).

The sales manager of Leisure World Foundation for Rossmoor Leisure World, Walnut Creek at most times herein was Mr. R. Moreno (Tr. 120-121).

Mr. Cortese guaranteed the notes of Leisure World Foundation to United California Bank for the sum of one million dollars (Tr. 1052).

c. Plaintiff

Plaintiff was Louis Rosen. His carpets and furniture store, Walnut Creek Furniture, was located in downtown Walnut Creek, a mile away from Rossmoor Leisure World (Tr. 586-587). He went out of business on September 5, 1967 (Tr. 617).

2. Relevant Market

Rossmoor Leisure World, Walnut Creek, is located on 2,000 acres of land in the City of Walnut Creek, California, the old Stanley Dollar Estate (Pl. Ex. 102, Tr. 221-222). Ground was broken in 1963 (Tr. 929). 10,000 to 12,000 units were contemplated (Id.). Mr. Rosen testified that a retailer could expect about a $2,000 carpet and drapery order on a move-in (Tr. 645). The conspiracy involved here affected, therefore, $20,000,000 possible sales of carpets and drapes.

Rossmoor Leisure World, Walnut Creek, is self-enclosed and has its own shopping facilities, community recreation facilities, medical center, churches, bank, police security systems (Tr. 482-484). By the beginning of 1966, Mutuals 1 to 6 had been completed or were starting construction (Tr. 491-492). The first move-ins of the residents in the community occurred about October 30, 1964 (Tr. 458).

Since the Crestmark Carpet and Drapery concession was located in the Administration Building where the Leisure World sales personnel were located, it was an easy matter for the Leisure World sales personnel to introduce the pro-

spective purchaser to the Crestmark Carpet and Drapery salesman who was also the color consultant of Leisure World (Pl. Ex. 36, Tr. 63, 128-129, 877-881).

In selling stock to a prospective purchaser, the details of the arrangements are explained by the Leisure World Foundation sales personnel (Tr. 528-531). As part of the introductory procedure, the potential purchaser is given a copy of the Leisure World News (Tr. 534). It is used in the sales literature package of Leisure World which the sales staff mails to those interested (Tr. 534-535).

As of August, 1967, 2,918 apartment units had been sold at Rossmoor Leisure World, Walnut Creek in three and one half years, at a dollar figure of $58,360,000.00 (Pl. Ex. 102, Tr. 221-222). As of the first of 1966 Rossmoor Leisure World, Walnut Creek's population was 3,274 (Tr. 458).

Pl. Ex. 74, Tr. 135-136, showed the extent of sales of carpets by Crestmark by Mutual No. and manors. As of October, 1967, Crestmark had sold 51% of the carpets at the 542 manors in Mutual No. 1; in Mutual 2 (468 manors), 42%; in Mutual No. 3 (324 manors), 46%; in Mutual No. 4 (374 manors) 43%; in Mutual No. 5 (274 manors), 47%; in Mutual No. 6 (176 manors), 43%; in Mutual No. 7 (188 manors), 53%; in Mutual No. 10 (244 manors), 52%; in Mutual No. 11 (214 manors), 48%; in Mutual No. 12 (140 manors), 22%; and in Mutual No. 13 (12 manors), 8%.

3. The Conspiracy in Restraint of And In Monopolization of Trade

In September, 1965, Leisure World News circulated a letter to all advertisers in its Leisure World News stating that, in part:

> The newspaper policy prohibits accepting certain types of advertising. These are:
>
> ....
>
> 3. The newspaper does not accept carpet and drapery advertising except the Rossmoor Leisure World company ads."

This excluded Mr. Rosen's advertisements. He had contracted to advertise for a year in May, 1965 (Tr. 589-591, Pl. Ex. 62, Tr. 235).

The policy was the subject of protest by other carpet retailers, J. C. Penny's, Capwell's (Pl. Ex. 50 A, Tr. 294-307).

It culminated other means taken to shut out competition in the sale of carpets at Rossmoor Leisure World, Walnut Creek. Crestmark's carpet salesmen were not identified to the purchaser of the manor, but were called color consultants. (Tr. 126-129, Pl. Ex. 36, Tr. 63-65). The carpet showroom was placed in the same building as the sales building (Pl. Ex. 9, Tr. 231-232). Leisure World salespersons were told to introduce the manor purchasers who had to select paint colors to the Crestmark salesmen as "the color consultants" (Tr. 128-129, 877-884). At the time of the picking of the colors, the purchaser of the manor was also told that only if he bought carpets through Crestmark could he have the carpets laid prior to his moving in. If he purchased elsewhere, he could not get his carpets installed until after the key was given to him (Tr. 156-158, 884). The Leisure World sales personnel were shown to have been monitored in their conversations with prospective purchasers by Leisure World managers to discourage any information as to purchasing carpets and drapes from out-

side sources (Tr. 535-537). In order to insure the introduction to the color consultant—carpet salesmen by the Leisure World sales staff spiff payments were made by Crestmark and it ran drawings, giving prizes to Leisure World sales people (Pl. Ex. 39-1, 39-2; Tr. 149-150).

Further, Leisure World would give no information as to the names of potential purchasers of manors to retailers. Mr. Rosen had been looking for some way of reaching the incoming buyers of carpets and furniture at Rossmoor since his first knowledge of the potential market (Tr. 586-590). He could not obtain information from Leisure World (Id.). But in May, 1965, Carl Cronin, the Leisure World News' advertising manager, approached Mr. Rosen and asked him to subscribe to an advertising contract. Mr. Rosen was enthusiastic and signed a 52 week contract for 26 advertisements (Pl. Ex. 62, Tr. 589-591). Mr. Rosen then inserted advertisements specially designed for the Rossmoor Leisure World market. He obtained floor plans and showed by type of manor the actual prices for each manor. They were below the Crestmark prices (Tr. 638). Mr. Rosen had gone to Mohawk Carpet and had obtained special purchase prices. He received roll prices on all carpets that Mohawk would supply. Mohawk further agreed to label the carpet by names that would be used for each type of floor plan (Pl. Ex. 65, 66, 67, Tr. 591-593). The prices shown by Mr. Rosen were special prices available for Rossmoor purchasers alone (Tr. 637). Other retailers of carpets who were also advertising or considering advertising in the Leisure World News were J. C. Penny, Capwell's, Jackson's Furniture, Sloanes, Redlick's and Harris of Concord (Tr. 446-447, 289-305).

a. Coercive Means Were Used to Further the Conspiracy

In July 1965, Mr. Cortese told Mr. Nelson, Administrator of the Rossmoor Leisure World, Walnut Creek, to tell the guy that runs the paper to get Rosen's advertising out of it (Tr. 518). The order was relayed to Mr. Ferris, Editor and Mr. Cronin (Tr. 259, 283, 518, 901-908). The newspaper staff revolted and attempted to have the order rescinded (See Pl. Ex. 49, 50, 51, 50A; Tr. 444-447, 452, 289-306). Meetings were held at Walnut Creek (Tr. 297-302, 436-437, 904-909). An argument was that the policy was in restraint of trade (Tr. 905-906). It was urged to be against the interest of the newspaper (Pl. Ex. 49, 50, 50A, Tr. 289-306, 444-447). Mr. Nelson wrote letters to Headquarters at Laguna Hills to protest the rule (Id.). Mr. Rosen protested by letter dated August 10, 1965. (cf. Pl. Ex. 54, Tr. 324). The policy continued from July, 1965. The above quoted September policy statement cemented the oral command of Mr. Cortese to Mr. Nelson. The only advertisers of carpets tolerated in the Leisure World News from July, 1965 to September, 1967 was Crestmark Carpet (Tr. 454, 921). In July, 1965 Leisure World sales people found that editions of the News containing Mr. Rosen's advertising had been scooped up so that the Rosen's advertisement could not be sent with the sales literature mailing (Tr. 534-538).

4. Effect of Conspiracy

Crestmark sold $551,977 carpets and drapes, fiscal year 1965, $835,897 worth of carpets and drapes in 1966, fiscal year, and in 1967, $418,803 (Pl. Ex. 77; Tr. 214; Pl. Ex. 92); Mr. Rosen sold $29,000 carpets and furniture in the second half of 1965, $19,152 in 1966 and $4,628 in 1967 (Pl.

Ex. 88, Tr. 629-631). His first half 1965 sales were $5,292. (Id.) In the fall of 1965 Mr. Rosen then achieved a spurt in his sales of carpeting and furniture to purchases at Rossmoor (Pl. Ex. 88, Tr. 609). He attributed these sales to the advertisements (Tr. 630-631). Before the advertisements he was not selling carpets and drapes to purchasers of the manors, and after the advertisements were stopped, his sales dried up (Pl. Ex. 88, Tr. 633-634). His first sale of a carpet to a Rossmoor newcomer was June 26, 1965 (Tr. 640-641). He saw his advertisements in the hands of purchasers (Tr. 597-598). A Crestmark salesman testified that he saw Mr. Rosen's ads in customers' hands and was asked questions about the advertisements (Tr. 894). Without the advertisements, Mr. Rosen testified he could not sell to the Rossmoor residents (Tr. 627-634, 639-640). The daily newspapers did not reach the market he was after. (Id.) In September, 1967 he closed his store (Tr. 617). He received no good will, and lost money on the sale of his inventory (Tr. 837).

B. COURSE OF THE PROCEEDINGS

The original complaint was filed on August 11, 1966 (Cr. 1-7). The supplemental complaint was filed on May 20, 1968 (Cr. 66-72). The Pre Trial Order was filed on July 31, 1969 (Cr. 109-124). Defendants filed a Pre Trial Statement and Trial Memorandum (Cr. 93-99; 136-150). Defendants' Proposed Instructions to the Jury were added to the record by order February 8, 1978.

Defendants' Leisure World Foundation and Golden Rain Foundation of Walnut Creek were named as defendants and dismissed without prejudice in July 1969 (Cr. 73).

In March 1970 the case was assigned to a visiting court, the Honorable Elbert Parr Tuttle, retired Chief Judge of the United States Court of Appeals for the Fifth Circuit and Senior Circuit Judge. Trial commenced before a jury on March 16, 1970 and continued until March 27, 1970.

The trial court granted defendants request that the jury answer special interrogatories under Fed.R.Civ.P. 49 (Tr. 1323, Appendix L herein). It is now admitted by defendants that they designed these interrogatories whose answers would govern the issues of fact in this case. In their Memorandum of Defendants-Appellants in Opposition to Plaintiff-Appellee's Motion to Recall Supplemental Briefs and to Augment Record on Appeal (dated Jan. 25, 1978) respondents stated at p. 9:

> ". . . defendants will admit that the meager record evidence seems to favor the plaintiff's view and will assume for purposes of the present discussion that they are the authors of the special interrogatories."

The jury returned the answers to the special interrogatories as shown in Appendix L (Cr. 161-162). Counsel for plaintiff then moved that a judgment be entered for plaintiff on the answers on the grounds that as a matter of law there was interstate commerce (Tr. 1330). This motion was denied (Id.). The trial court then ordered judgment to be for defendants (Tr. 1332).

Following the order granting the judgment for the defendant, plaintiff filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial (Cr. 163-185). Plaintiff urged that defendants were liable to plaintiff under Section 4 of the Clayton Act as a

matter of law and that there was no evidence upon which the jury could reasonably conclude that the conspiracy among the defendants and Leisure World Foundation to exclude plaintiff from the carpet or other business at Rossmoor Leisure World, Walnut Creek did not have a substantial effect or was not in the flow of interstate commerce.

The defendants did not move to have the jury's answers set aside. This was so although it found the existence of the conspiracy they urged as not having occurred. Their post trial position was simply a legal justification for the entry of a judgment based upon lack of interstate commerce (Cr. 186-216). No attempt was made to urge justification for the entry of judgment in the failure of proof of a relevant market. To the contrary, defendants' position was that the interstate commerce involved was that of plaintiff's business. They conceded in their jury interrogatories and their post trial papers that the relevant market could be assumed to be Rossmoor Leisure World. Their emphasis was on lack of interstate commerce. Defendants stated in their post trial memorandum at Cr. 199-200:

> "Nor can Plaintiff successfully argue that there is any evidence to support an inference that Crestmark or Rossmoor sought to monopolize the interstate carpet business. The evidence conclusively showed that Crestmark made no sales of carpets and drapes outside of Rossmoor Leisure World, and actually sought only that business.
>
> . . . .
>
> It is submitted that Plaintiff's simplistic approach ignores a great body of law to the contrary and the inescapable fact that the relevant business and market involved in this case was strictly local in character."

The motion of plaintiff for a judgment *n.o.v.* was denied and judgment was entered for defendants (Appendix K).

The Court of Appeals reversed the judgment for respondents here (Appendix I herein). It initially ordered that judgment be entered for plaintiff. Thereafter, respondents filed Appellees' Petition for Rehearing including Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Suggestion for Appropriateness of Rehearing en banc (Cr. 287-343).

The Court of Appeals thereafter entered its order denying the petition for rehearing, denying the suggestion for a rehearing en banc, but eliminating its last sentence granting judgment for plaintiff (Appendix J).

The appellate court stated that the jury's answers to the special interrogatories showed respondents to be conspirators who had entered into a conspiracy to exclude plaintiff from the business of selling at retail in a local market products produced in other states, and that they had restrained plaintiff's retail business to his damage (Appendix I). The court also stated that the respondents, by restricting plaintiff's participation in retail transactions (at Rossmoor Leisure World), and by eventually excluding plaintiff entirely from this trade, diverted interstate shipments of carpeting from plaintiff to themselves, thus interfering with the natural flow of interstate commerce (Appendix I).

Petitioner on remand moved to enter judgment on the opinion and mandate (Cr. 244-273). Defendants opposed the entry of judgment for plaintiff and filed their Memo-

randum in Opposition to Motion to Enter Judgment (Cr. 273-282).

The trial court thereafter ruled that the jury's findings were sufficient under law to enter judgment for plaintiff; that the respondents had urged upon the appellate court motions to enter judgment *n.o.v.* or for a new trial; that since the appellate court under *Neely* may make final disposition of such motions; the ruling of the court of appeals denying the petition for rehearing; declining to grant any motions of respondents, and failing to order the hearing of any motions of respondents, disposed of any attempt to urge upon the trial court the very same matters already submitted to the appellate court and acted upon in its mandate (Appendix G herein). Thereafter, respondents filed motions for a judgment *n.o.v.* or for a new trial (Cr. 386-417). They were denied (Cr. 370-376, Appendix H).

Defendants below then appealed. The matter was then heard by a different panel. It concluded that the remand order of the court of appeals was an express direction to hear all the arguments advanced by the respondents, including the arguments for a judgment *n.o.v.* (Appendix E herein).

On remand the trial court found that substantial evidence supported the findings of the jury (Cr. 514-516, Appendix D), and entered judgment for petitioner (Cr. 517-521, Appendix C).

At the hearing of the oral arguments, during the third appeal, the Court of Appeals requested briefing as to the issue of relevant market (Order filed Jan. 12, 1978). Petitioner thereafter filed his Motion to Recall Supplemental Briefs and to Augment the Record on Appeal on the ground

that respondents were estopped to raise relevant market as being other than Rossmoor Leisure World of Walnut Creek (Filed Jan. 18, 1978). The Court of Appeals then deferred action on this motion (Order, Feb. 8, 1978). The motion was denied in the opinion (Appendix A herein).

C. CHANGING DEFENSES OF THE DEFENDANTS

At no time in the course of these proceedings, prior to or at the trial, did defendants ever suggest that a combination or conspiracy in unreasonable restraint of trade under Section 1 of the Sherman Act could not occur if the trier of fact believed that Mr. Cortese ordered Mr. Nelson to inform the editor of the Leisure World News to kill Mr. Rosen's advertisement. The issues were conspiracy and lack of interstate commerce. The Pre-Trial Order, Cr. 117-118, contains no issue to be tried on the need to prove a relevant market. In the Statement of Law section plaintiff stated that a concerted agreement to preclude others from advertising carpets and drapes in the Leisure World News and to preclude his competition in other ways is in unreasonable restraint of trade (Cr. 118). The Trial Statement of Defendants listed conspiracy, lack of any affect on interstate commerce, and damages to be the issues (Cr. 136-150). Defendants told the fact finder Mr. Cortese could not and would not subvert the will of the Leisure World newspapermen, that Leisure World and Rossmoor were distinct entities (Tr. 37, 38, 41, 273-74, 996-997, 1254-1259, 92-94, 1074-1078, 330-332, 498, 503, 950-951, 974, 1036, 1045-1046, 1081, 1101-1102). Mr. Cortese was emphatic in his denial of his ever having issued the exclusionary order (Tr. 1081).

Not one word concerning the relevant market appears in defendants' proposed jury instructions. Their instruction

No. 11 regarding attempt to monopolize adopts the rule that only intent need be shown and that some act be done in furtherance of the intent. Their instructions on the conspiracy issue do not speak in terms of reduction of competition in a market. They, indeed, submitted "monopolization" instructions to the court (Df's Requested Instruction No. 10).

On appeal, respondents stated in their Appellee's Brief in *Gough I*, No. 26,475, at page 4:

> "The relevant market is the market which consists of the sale at retail of 'carpets and drapes and related sales of household furnishings to residents or prospective residents of Rossmoor Leisure World, Walnut Creek, California.' (Complaint, Par. 10, Cr. 4)."

THE REASONS FOR GRANTING THE WRIT

I. This Court Should Review Decisions Which Apply Doctrines to Exempt Conspiracies in Restraint of Trade from the Sherman Act.

A. The Relevant Market Need Not be Shown in a Hard Core Section 1 Conspiracy Case Since Congress has Prohibited the Entry into Coercive Conspiracies Whose Purpose and Object is to Suppress or Exclude Competition in Any Appreciable Part of Interstate Commerce.

1. The Sherman Act Prohibits the Entry into a Conspiracy to Prevent Interbrand Competition in any Appreciable Part of Interstate Commerce.

Proper application of the antitrust laws imposes liability when independent business entities conspire or agree

to limit, prevent or exclude competition to them as to any appreciable part of interstate commerce. Manifestly, application of the *per se* rule is not limited to four categories of means used as stated below.

The central issue of judicial attention is whether the conduct is unduly restrictive of competitive opportunities or commercial freedom. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), at n. 28.

Indeed the learned court below failed to focus upon the declaration of this Court in *International Salt Co. v. United States*, 332 U.S. 392 (1947) where this Court stated at 396:

> ". . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market."

The Court relied on *Fashion Originators' Guild of America v. Federal Trade Commission*, 114 F.2d 80, affirmed, 312 U.S. 457 (1941) for this assertion. There Judge Learned Hand had stated at 85:

> "Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade'. It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or producers who remain."

Conspiracy in fact which is aimed at the elimination of interbrand competition is to be distinguished from conspiracy implied at law when contractual provisions are enforced on intrabrand dealers to promote interbrand competition. Compare *White Motor Co. v. United States*, 372 U.S. 253 (1963), *Continental TV, Inc. v. GTE Sylvania, Inc.*, supra, with *United States v. Kissel*, 218 U.S. 601 (1910); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923); *United States v. Socony Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), 224, n. 59; *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Wm. Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738 (3d Cir. 1945); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) at 404; *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973); *De Voto v. Pacific Fidelity Life Ins. Co.*, 516 F.2d 1 (9th Cir. 1975); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296 (9th Cir. 1978); *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, 152 F. Supp. 136 (D.C.N.Y. 1946); *Quemos Theatre Co. v. Warner Bros. Pictures*, 35 F.Supp. 949 (D.C.N.J. 1940).

Under the rule of reason, purpose is a basic inquiry and here the purpose has been found to be anticompetitive. It is sufficient that a conspiracy has been entered into by independent entities to foreclose a substantial interstate market. *National Society of Professional Engineers v. United States*, ... U.S. ....., 98 S.Ct. 1355 (1978).

As stated in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976):

> "Thus, since in this case the allegations fairly claim that the alleged conspiracy, to the extent it is successful, will place 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce, they are wholly adequate to state a claim."

In *Pfizer, Inc. v. Government of India*, ... U.S. ....., 98 S.Ct. 584 (1978) this Court stated at 588:

> "The Court has noted that § 4 has two purposes: to deter violators and deprive them of the 'fruits of their illegality', and 'to compensate victims of antitrust violations for their injuries'."

Respondents tried the case under these still vital statements of antitrust law. The jury here found a purpose and intent to exclude interbrand competition by withholding information from the public in a 20 million dollar market. Barriers of entry were created to competition in a market financed by federal mortgage guarantees. There can be no basic distinction between *Gough III* and the District Court in *United States v. General Motors Corp.*, 234 F.Supp. 85, unanimously reversed, 384 U.S. 127 (1966). The same device of ignoring the purposes, scope and effect of a conspiracy was used to immunize a hard core conspiracy from liability. It is clear that the learned court below is attempting the use of another doctrine in the long list of devices asserted to exempt parties from antitrust liability in private actions. This is contrary to this Court's teachings in *Radovich v. National Football League*, 352 U.S. 445 (1957) that Congress has acted to punish or deter conduct in restraint of trade and has declared a private cause of action for this purpose.

B. This Court Has Heretofore Resisted All Efforts to Shift Judicial Attention Away From The Purposes, Scope and Means of the Conspiracy to Suppress Competition.

In *Binderup v. Pathe News Exchange,* 263 U.S. 291 (1923) this Court reviewed the defense that since the distributors could severly terminate contractual arrangements, there can be no restraint on interstate trade and commerce when a combination or conspiracy accomplishes that which the individual could lawfully do and it was applicable to only a single merchant. But it was held that a combination or conspiracy which suppresses the trade of a single dealer by restraining his liberty to engage in business, as a necessary corollary restrains interstate trade and commerce and is in violation of the Act. To the contrary of the doctrine of a relevant market as used below, *Binderup* establishes that a combination and conspiracy which suppresses the trade of a single merchant is actionable without more. See also *Eastern States R.L.D. Associates v. United States,* 234 U.S. 600 (1914). Since *Gough I* held that an appreciable part of interstate commerce was involved at Rossmoor Leisure World in the retailing of carpets, *Binderup* compels the enforcement of the judgment here.

Next, in *United States v. First National Pictures, Inc.,* 282 U.S. 44 (1930), the Supreme Court rejected, out of hand, the contention which has some surviving effect in the opinion below, that it is no defense that the conspiracy does not suppress all competition between the parties, and is limited in its objectives.

In *Associated Press v. United States,* 326 U.S. 1 (1945) it was urged that a combination should not be subject to

the prohibition of the Sherman Act unless the conspiracy precluded the public from access to the product involved; that a conspiracy can exclude others if the product is otherwise available. This Court rejected this doctrine, then called "indispensability." This Court in *Associated Press* said that the defense of availability of product in the market place to immunize anticompetitive conduct would make the Act a dead letter in all fields of business.

In *Radovich v. National Football League,* 352 U.S. 445 (1957) this Court struck down the attempt of the judiciary to require plaintiff to prove a public injury apart from a conspiracy in restraint of trade. The Court stated:

> "In the face of such a policy this Court should not add requirements to burden the litigant beyond what is specifically set forth by Congress in those laws."

Then, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), the attempt to make availability of the product to the public in the area of dispute under the defense of lack of public injury was rejected. The Clayton Act was held to specifically allow the recovery of damages by a single merchant regardless of access of the public to the goods and wares to which he was unlawfully deprived. The doctrine of relevant market to exempt the conspiracy to exclude Mr. Rosen cannot be distinguished from the doctrine of public injury which was used to exempt Broadway-Hale from liability. Both require a self answering market analysis independent and apart from the objectives and means of the conspiracy to deprive an interbrand competitor of a free and untrammelled market place. But it is that market place which Congress has guaranteed and which the judiciary must enforce.

Clearly, the court below has failed to apply the rule of *Radovich, Klor's* and *General Motors* that there is no defense to the entry into a conspiracy with a proven objective to exclude competition, by using an unlawful means of refusal to deal.

As stated in *United States v. General Motors,* 384 U.S. 127, 146:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell the public, we need not inquire into the economic motivation underlying their contract."

C. The Means Used by the Conspiracy Here are Also in Per Se Violation of the Act.

1. The refusal to deal was a per se violation.

Just as in *General Motors* and *Klor's,* the trial record here cannot be ignored. As such, it cannot be validly stated that this record does not disclose a group boycott, a price fixing agreement and an agreement to eliminate competition between members of a combination. There is no doubt as to the showing of a refusal to deal. There is no antitrust principle which protects that refusal to deal because the court can find only one competitor to the victim involved in the conspiracy. This was the same situation in *Klor's, supra.* A group boycott exists for antitrust purposes when a conspiracy imposes a refusal to deal which has anticompetitive purposes or effects. Further, a restraint imposed on a supplier is deemed horizontal, not vertical. *United States v. TopCo Associates,* 450 U.S. 596 (1972). Rossmoor or Crestmark are not suppliers to the Leisure World News; they are advertisers. They have no

enforceable contractual right for the protection of trademarks or goodwill. Rather, they imposed a restraint on the News. This Court in *Continental T.V. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977) stated that contractual provisions in licensing or appointment arrangements are subject to the rule of reason when the relationship of the parties show that a manufacturer has valid business reasons for placing restraints upon his dealer organization. In footnote 28, this Court specifically excepted from such rule restraints imposed by others on the manufacturer in order to protect the parties from interbrand competition. Here the agents for the retirement community whose function is to protect the purchasers of manors can clearly not be restrained by Mr. Cortese to protect his little side venture which was really outside F.H.A. perusal. Clearly, this conduct is no more subject to judicial approval than *Lorain Journal's* similar edict. Indeed, the defendants told the court and jury that they could not and would not interfere with the community's newspaper (Cr. 95, 117-118, 137; Tr. 1258).

2. Respondents Were Effecting A Stay Out Of Rossmoor Policy.

The learned court below is really enforcing a division of territory agreement in which Crestmark sought a deal that if we do not compete in Walnut Creek, you cannot compete at Rossmoor Leisure World. The court below is in effect holding that Mr. Rosen should never have started his plan to actively compete against Crestmark. But Mr. Rosen, Penney's and other retailers are protected in this competition. A little protectionism is not within the rule of reason. Such an implication runs directly against *Lorain Journal v. United States,* 342 U.S. 143 (1951).

3. The Respondents Were Fixing Prices

Nor can the courts be blind to the price fixing involved here. Over and over, petitioner asserted that his advertising showed lower prices than Crestmark's; that this was a major reason for the order of Mr. Cortese, to, "get that guy out of the paper."

Clearly, this is a consideration to be dealt with and not ignored. *General Motors* involved a larger geographical area than did the Rossmoor Leisure World, but in each case the clear purpose and effect was to prevent access of discounters to the market place. The final effect, as heretofore indicated, is the demise of Mr. Rosen's business. But the purchasers of manors at Rossmoor Leisure World were deprived of access to information in a paper used as sales literature that Mr. Rosen had specially priced carpets for use at their manors at prices below Crestmark's. Relevant market is no more a defense here than enforcing contracts were in *General Motors.*

It is noted that the decision below is in direct conflict with a decision of another panel issued the same year, *Fount-Wip, Inc. v. Reddi-Wip, Inc.,* 568 F.2d 1296 (9th Cir. 1978). There a plaintiff was allowed recovery for injuries sustained when a competitive licensor of aerosol whipped cream and a dairy owned by the licensor combined to refuse to deal with the plaintiff. This was so notwithstanding the failure to have proved a relevant market for the purposes of § 2 of the Sherman Act or § 7 of the Clayton Act. The jury's findings that the purpose and object of the conspiracy was in restraint of trade was held to have established a violation of the Sherman Act.

D. Competition in a $50,000,000 Retirement Community Is Subject to Judicial Protection Under § 2 of the Sherman Act.

1. A community is a significant part of commerce under Section 2.

Further departure from well established precedent is seen in the rejection of Rossmoor Leisure World, Walnut Creek as a relevant market. The court held that the trial court had found this to be the relevant market. There was substantial evidence that Rossmoor Leisure World at Walnut Creek was a legally definable relevant market, and this Court should prevent a gross injustice from occurring.

The decision below is in direct conflict with *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951) which held that potential advertisers in a community of 11,325 dwelling units could not be the subject of a restriction by the only newspaper in Lorain that they could not advertise over a competitive radio station. The City of Lorain was deemed a part of interstate commerce (342 U.S. 151, n. 6).

Rossmoor Leisure World is also a community. In order to gain access to its newcomers merchants had to obtain the attention of the carpet buyer before he was introduced to the color consultant—Crestmark carpet salesmen.

The Court in *Lorain* stated at 152:

> "Unless protected by law, the consuming public is at the mercy of restraints and monopolization of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth."

That monopolization may occur in single communities, or portions of them, is also clear from *United States v. Griffith,* 334 U.S. 100, 106-107. Subsequent decisions make it clear that a relevant market may be any commercially significant section of the country where parties compete. *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962), at 336, *United States v. Marine Bancorporation,* 418 U.S. 602 (1974). *Gough I* has already ruled that Rossmoor Leisure World is a significant section of the country. *Brown Shoe* stated at 370 U.S. 337:

> "Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area."

2. Relevant market is definable in terms of where sellers seek to compete.

In *Marine Bancorporation,* this Court defined the relevant market as the area where the parties are in actual and direct competition. Here that area is Rossmoor Leisure World.

3. The barriers erected by sellers may define a relevant market.

Further, barriers to competition are used to define the relevant market. No discussion of this principle is found in the opinion below, but it cannot be ignored as it is entrenched. *William Goldman Theatres v. Loew's, Inc.,* 150 F.2d 738 (3d Cir. 1945). *Woods Exploration & Prod. Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), 1306 (1971); *Gamco, Inc. v. Providence Fruit & Produce*

Bldg., 194 F.2d 484 (1st Cir. 1952). In *Gamco* the court stated at 487:

> ". . . alternatives will not excuse monopolization". . . . . The Act does not merely guarantee the right to create markets; it also insures the right of entry into old ones." at 488:
>
> "But the latent monopolist must justify the exclusion of a competitor from a market which he controls.

The court below further adopted the singular test of defining the relevant market as the area where the purchaser can reasonably turn to obtain the product. None of this Court's monopolization cases may be so limited. It may also be where the sellers or suppliers seek to compete to afford the lowest prices and the best quality to those they wish to sell. The test is competition, not public injury. In short, the opinion below misses the entire thrust of this action; those with monopolistic advantage used conspiracy and unlawful means as a way of excluding others. This is actionable conduct. *United States v. Griffith,* 334 U.S. 100, 106-107 (1948). *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951) ("The operator of the radio station, equally with the publisher of the newspaper, is entitled to protection of that Act." (at 155))

E. Relevant Market is Not a Test When Conspiracy or Attempt to Monopolize is In Issue.

Relevant market as involving the definition of the product and the geographical extent of competition is a necessary element for the offense of monopolization only. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377 (1956); *Walker Process Eqpt. Inc. v. Food Machinery and Chemical Corp.,* 382 U.S. 172 (1965), *United States v. Yel-*

low Cab Co., 332 U.S. 218 (1948), *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964);

F. Relevant Market Does Not Allow the Appellate Court To Order Judgment for the Respondents.

Justice will not tolerate the *ad hoc* use of the doctrine of relevant market to allow the entry of judgment here. Firstly, relevant market is not the same as the rule of reason. Yet, the court below justified its imposition on the validity of the judgment below as a part of the rule of reason. But the rule of reason places the burden of vindication of the adopted rule in restraint of trade upon the perpetrators, not the government or the private person. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918). This rule allows the defense to establish procompetitive benefits. Its very statement shows its inappropriateness here. In *Board of Trade* the Court stated that purpose or end sought to be achieved under the Rule of Reason are relevant factors. If so, the judiciary cannot allow a judgment to be reversed upon a standard which demands factual inquiry when the record supports the very facts this Court stated were relevant to determine unreasonableness? Inquiry is not a door slamming proposition; it is investigative. Nothing here tolerated the finding that the rule against outsider advertising in the Leisure World News, in frauding the public at Leisure World, at diverting trade by conspiracy is reasonable. Yet a judgment is to be wiped out under its name. The proper administration of justice prevents this result.

II. This Court Should Enforce Rules Which Prevent Litigants From Urging as Error Their Own Submissions or Offers.

A. Litigants are Estopped from Obtaining the Benefits of Their Own Errors

It is respectfully submitted that the learned court below has ignored entirely the manner in which this case was tried. At no time until they learned that judgment was going to be entered against it, did respondents ever advance the contention that this conspiracy involved here as a Section 1 offense was subject to the rule of reason. They conceded that the relevant market was Rossmoor Leisure World, Walnut Creek.

Respondents failed to file a cross-appeal in 1970 or otherwise abandon their view of interstate commerce during the course of the appeal. This view emphasized the purely local nature of the competition here and asserted Rossmoor Leisure World to be the relevant market.

Their interrogatories to the jury defined the relevant market to be Rossmoor Leisure World. The learned court of appeals below ignored the issues of estoppel and waiver. Its position was that plaintiff in the complaint had defined the relevant market and it was denied. In fact, the complaint raised unreasonable affect on interstate commerce and alleged the conspiracy's objectives, means and effects. The failure to have found estoppel ignores the pretrial order, the lack of any dispute at the time of trial, the defendants proposed instructions which failed to make any issue of fact or law as to a separate issue of relevant market other than Rossmoor Leisure World, and admissions in their Appellees' Brief filed in *Gough I*.

The learned court below also makes reference to the statements by plaintiff's counsel to the jury as showing that there was a contested issue of a relevant market. The following statements of plaintiff's counsel are in direct contradiction to this holding. At Tr. 1217:

> "So if you find then that there is an agreement between Leisure World operating a newspaper and Crestmark to prevent Mr. Rosen from advertising for the benefit of Crestmark, this is a violation of interstate commerce . . ."

At Tr. 1218:

> "We have alleged that there is a violation of both provisions involved here. Now under the first section all we would have to do would be to prove to you that there is an agreement."

As to Section 2 of the Sherman Act, counsel stated at Tr. 1219:

> "Now, therefore, violation of § 2 is a determination that there is a relevant market which is a definable marketing area to which there ought to be free competition and free services made available and as to which there can be a monopolization. Now the relevant area we would say to you here, is Rossmoor Leisure World. We have the bulletin for you. You can see that it is a separate community, it is a community mainly aimed at retirement people. It has its guard house, community facility building, golf course, and it is designed to operate pretty much like a city operates."

Clearly it appears that both parties in no way made an issue of the relevant market as other than Rossmoor Leisure World. It was not an issue under § 1 of the Sherman Act. It was conceded by respondents under Section 2

of the Act since their attack was on lack of interstate commerce. It is to be further emphasized why this is the case. There is no authority from this Court indicating that relevant market is an issue in a conspiracy to suppress competition case. The citations authorizing the reversal of the judgment in the plaintiff's favor refer to cases after the trial in this case in March, 1970: *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 627 (9th Cir. 1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Cataphote Corp. v. DeSoto Chem. Coatings, Inc.*, 450 F.2d 769, 773 (9th Cir. 1971), *cert. denied*, 408 U.S. 929 (1972).

Clearly a litigant cannot require a trial on controverted issue of fact and after reversal on appeal assume a contradictory position. Intentional contradiction cannot be used as a means of obtaining unfair advantages in a forum provided for suitors seeking justice. See *Zenith Radio Co. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Scarano v. Central Ry. Co. of New Jersey*, 203 F.2d 510 (3d Cir. 1953); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2d Cir. 1963); *Wood v. United Air Lines* 216 F.Supp. 340 (E.D.N.Y. 1963).

For the antitrust laws to be otherwise interpreted means that a wealthy and powerful defendant can exhaust the plaintiff of small means when Congressional purpose is the exact opposite. Are we now back to pre-World War II statistics where virtually the only successful plaintiffs were those with a government judgment on their behalf? It is to be noted that in the *Fount-Wip case, supra*, 568 F.2d 1296, another panel of the same circuit allowed a jury verdict to be enforced for the plaintiff notwithstanding the

defendant's contention that the defenses of release and res judicata be considered. The failure to preserve the issues were found. Here respondents are clearly allowed to blow hot or cold depending on the latest appellate ruling.

B. In any event, Judgment n.o.v. Cannot be Entered for Defendants Because They Failed to Make a Motion Within 10 Days after the Findings of the Jury.

The rule of this Court is express and prevents the appellate court from entering judgment *n.o.v.* for the respondents. *Globe Liquor Co. v. Roman*, 332 U.S. 571 (1948); *Cone v. W. Va. Pulp & Paper Co.* 330 U.S. 212 (1947); Cf. *Neely v. Martin K. Eby Construction Co.* 386 U.S. 317 (1967). In *Neely*, this Court stated, 386 U.S. 325-326:

> "The opinions in the above cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved."

Failure to have followed this rule has prejudiced petitioner who would have had the case resolved in 1973 rather than 1978, and now do not obtain a new trial.

III. Judgment Cannot be Enforced When Based on an Appellate Court Entering Findings of Fact Contrary to the Trier of Fact.

Reversal of the trial court's judgment in *Gough III* cannot be tolerated if respect is given to the proposition that those responsible for determining the credibility of witnesses are the sole triers of fact. *U.S. CONST., amend.* VII. The federal courts on appeal cannot reexamine the facts found by the jury. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). The following statements by the appellate court simply have no foundation.

1. In order to meet the requirements for securing FHA financing for construction of the housing, the Foundation is formally independent of Rossmoor (Appendix A-2).

There is more than formal independence. The extensive trial involved the issue of conspiracy among the defendants who asserted that Leisure World Foundation and Rossmoor were independent and distinct entities and that Rossmoor in no way controlled Leisure World Foundation (Tr. 37, 38, 41, 273-274, 996-997, 1244-1245, 92-94, 1074-1078, 330-332, 498, 503, 950-951, 974, 1036, 1045-1046, 1081, 1101-1102). Otherwise, they have filed false affidavits with the F.H.A.

2. Here the concert of action was between a sole competitor and that competitor's parent and in no way involved an agreement among competitors (Appendix A-13).

But Leisure World News is a member of that conspiracy notwithstanding the fact it was an agent of the Mutual Corporation and not Rossmoor Corporation. It has an agents obligation to promote competition.

3. That agreement which only prevented advertising of carpets in the News, did not deprive Rosen of an element necessary to compete; other means of advertising, including other newspapers, were readily available (Appendix A-13).

But this was in dispute and is based on a reexamination of the damage award. As heretofore shown, the record showed complete barriers to the retailers attempting to compete. Mr. Rosen could not obtain names of the prospective purchasers of manors; the purchasers were introduced to the carpet salesman as a color consultant. Only Crestmark had the privilege of installation, conversations were monitored, issues of the paper were destroyed, mailings were scooped up, and the objective was to exclude.

The jury did not accept the proposition that other advertising was effective. The carpet purchaser had to be contacted prior to the introduction of the Crestmark salesman as color consultant. The Leisure World News was on the sales tables, in the sales rooms, or received in the mail. The evidence was substantial that sales were made by petitioner to Rossmoor purchasers in the fall 1965, and then dried up. The jury found that the conspiracy reduced Rosen's sales, profits and was a substantial factor in causing the closing of the store.

4. We do not know the extent to which the restraint contributed to Rosen's business failure (App. A-15).

But the jury found the extent and the reversal here is not based on the failure of evidence as to proximate cause. It is self-evident that a business is not going to close if it has legitimate access to millions of dollars of sales upon a record which showed sales success based on a particular means of getting sales information to the public. The Court of Appeals is, in effect, rejecting Mr. Rosen's testimony concerning his limited success. But *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946),

expressly allows the awarding of damages based upon profits during a pre-conspiratorial period of time.

4. There was no attempt to put him out of business (Appendix A-15).

But the answers to the interrogatories state specifically that there was a common plan to prevent advertising at Rossmoor Leisure World, such as to act as a restraint upon plaintiff's business. It awarded damages because it found the closing of a business by unlawful restraint. The court here is in direct conflict with *Lorain Journal,* 342 U.S. at 153-155.

5. Other newspapers and means of conveying his commercial message were still open to him, and accordingly he was not without suppliers of that which was denied to him by the refusal to deal (Appendix A-15).

The jury found otherwise. The courts may not allow a conspiracy to dictate on what terms competitors may compete. *Lorain Journal Co. v. United States,* supra, 342 U.S. at 154, n. 8.

6. It was not predatory to cause the foundation to bar Rosen from advertising in the News (Appendix A-19).

But the free market allowed Rosen to advertise in the newspaper he wanted to advertise in. Independent newsmen were against the policy. They testified that freedom of the press had been interfered with, and argued that a restraint of trade had occurred. Coercion had taken place. The testimony of these men and what they stand for has been totally disregarded. The substitution of free choice

by a coercive conspiracy is predatory. *Lorain Journal Co. v. United States,* 342 U.S. at 149, 154, n. 8.

7. Access to Leisure World was not denied. Access to the advertising columns of the News was denied, but that was all (Appendix A-13, n. 8).

Access to Leisure World was denied in every conceivable way it could be. The jury disagreed with the court of appeals. So, also, the radio station in the *Lorain Journal* case should have been satisfied with its being told to stay with Elyria advertisers.

IV. The Opinion in Gough III Violates the Doctrine of Law of the Case

Gough I stated in 1973 that the jury's factual findings that defendants with the power and intent to exclude plaintiff from the Rossmoor Leisure World entered into a plan to restrain plaintiff's business established as a matter of law that defendants had violated the Sherman Act (Appendix I-6). It also stated that the jury's findings of damages established as a matter of law that plaintiff had the right to redress (Id.).

The trial court on remand following *Gough II* found that the evidence to support these findings was substantial. Clearly, *Gough III* in reversing *Gough I* is acting contrary to the doctrine of Law of the Case. *May Department Stores v. Reynolds,* 140 F.2d 799 (8th Cir. 1944); *Donnelly Garment Co. v. N.L.R.B.,* 123 F.2d 215 (8th Cir. 1942); *In re Carmona,* 224 F.Supp. 497 (S.D. Ca. 1963), *affirmed,* 336 F.2d 518 (9th Cir. 1964).

CONCLUSION

This Court has always taught that private litigants should be encouraged by the judiciary to bring their antitrust actions. The purpose of this encouragement is to prevent restraint of trade and wrongs to the public by the deprivation of free markets. The result in this record shows, however, that facts are decided by the appellate court and a subsequent panel has overruled a prior panel. The Charter of Freedom has now been written to cause unnecessary and complex trials whose effect is to further allow disrespect for the Act. The opinion below represents a serious change in the course of antitrust litigation and on this record supports an unfair advantage taken by the respondents.

Clearly, a petition for certiorari ought to be granted in this case. In consideration of the history of this litigation the Court should consider a *per curiam* affirmance of the judgment for petitioner entered by the trial court.

December 12, 1978.

MAXWELL KEITH
ANTHONY J. MERCANT
MERCANT & O'BRIEN
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Attorneys for Petitioner

(Appendices Follow)

Appendices

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

No. 77-2047

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, d/b/a Walnut Creek Furniture,
Plaintiffs-Appellees,
vs.
Rossmoor Corporation, and Crestmark Carpet and Drapery Company,
Defendants-Appellants

[Filed August 9, 1978]

On Appeal from the United States District Court for the Northern District of California

OPINION

Before: MERRILL, KILKENNY and CHOY, Circuit Judges

MERRILL, Circuit Judge:

The question on appeal is whether, absent a definition of the relevant market, the record supports a judgment that appellants violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. We hold that it did not and reverse judgment of the district court.

THE CAST

Rossmoor Leisure World (Leisure World) is a co-operative housing development for retired adults, located in Walnut Creek, California.

Rossmoor Corporation (Rossmoor) is the builder and developer of Leisure World.

Leisure World Foundation (the Foundation) is a nonprofit corporation established to perform administrative services for the residents of Leisure World and also to perform organizational, promotional and sales functions for Rossmoor. In order to meet the requirements for securing FHA financing for construction of the housing, the Foundation is formally independent of Rossmoor.[1] (Title to the community recreational facilities is held in trust by another independent foundation that appears less frequently in the case: the Golden Rain Foundation.)

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[1]The relationships between the Foundation and Rossmoor on the one hand, and the Foundation and the residents on the other, involve a complex arrangement, making possible the development of the community, the financing of construction and the sale of Leisure World residences. Leisure World, as it presently exists, did not come into existence at one time. It resulted from a series of development projects, each adding geographically to the community. For each project a mutual corporation was organized which took from Rossmoor title to the land involved. Those who planned to secure a residence in the project purchased shares in the mutual, which shares entitled them to occupancy of a residence upon its construction. Rossmoor and the mutual then entered into a purchase and construction contract, and when 90 percent of the mutual stock was sold construction commenced. The Foundation acts as an administrative arm of the mutuals. At the outset of a new project it is also involved in promotion and sale of stock in the mutual and thus is closely aligned in interest with Rossmoor, whose interest lies in the construction and sale of residences. With construction completed the principal function of the Foundation has to do with its responsibilities to the residents and mutual stockholders—the handling of their residential concerns, the upkeep of common areas, and management of community facilities.

Crestmark Carpet and Drapery Company (Crestmark) is a wholly owned subsidiary of Rossmoor, formed for the purpose of selling carpets and draperies to the Leisure World residents. The Foundation has leased space in its administration building to Crestmark giving it the exclusive right to sell carpets and draperies from a site within Leisure World.

The Leisure World News (the News) is a community newspaper owned and published by the Foundation. It is primarily concerned with Leisure World events and is used as a promotional device for prospective purchasers of housing.

Louis Rosen was the owner of a furniture and carpet store in Walnut Creek; appellee Gough is his trustee in bankruptcy.

THE GRIEVANCE

In April, 1965, the Foundation began publishing the Leisure World News. Rosen was solicited by the advertising manager and placed seven carpet, drapery and furniture advertisements in various issues of the News. In July, 1965, under a new policy, the News refused to accept further advertisements from carpet retailers other than Crestmark, and no further advertisements from Rosen were accepted.

Rosen then commenced this action, alleging violations of § 1 and § 2 of the Sherman Act, 15 U.S.C. § 1 and § 2. He alleged that Rossmoor, the Foundation, Golden Rain Foundation and Crestmark had conspired to restrain competition by refusing to allow him to advertise in the News, and that the conspiracy was with the intent of enabling Crestmark to monopolize the market for carpets in Leisure World. He

sought treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, for injuries suffered by him by reason of the Sherman Act violations.

THE CASE

The case has been before this court on two prior occasions.

The Foundation and Golden Rain Foundation were dismissed from the case prior to trial, although their status as coconspirators was retained. Following trial to a jury the issues were submitted to the jury in the form of interrogatories, which were answered by the jury as follows:

> "1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan, scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?
>
> Yes.
>
> 2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?
>
> Yes.
>
> 3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?
>
> No.

> 4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?
>
> Yes.
>
> 5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.
>
> | | |
> |---|---|
> | Net Profits | $18,143.00 |
> | Good Will | 22,738.00" |

Because of the jury answer to interrogatory No. 3, relating to interstate commerce, the trial court entered judgment for the defendants on the ground that the court lacked jurisdiction under the Sherman Act. The first appeal to this court was then taken. During the pendency of that appeal Rosen was adjudicated bankrupt and appellee Gough, as trustee in bankruptcy, was substituted as plaintiff-appellant. On Gough's appeal this court held that a substantial effect on interstate commerce appeared as matter of law and that it had been error to put the jurisdictional question to the jury. *Gough v. Rossmoor Corp.*, 487 F.2d 373, 377 (9th Cir. 1973). This court originally directed that the case be remanded with instructions that judgment be entered for the plaintiff in accordance with the jury's findings. Appellants sought rehearing and asked this court to enter judgment notwithstanding the verdict on the ground that the record did not support the jury's findings and that the findings did not support judgment in that no finding had been made defining the relevant market, and that there was nothing in the record upon which such a finding could have been made. This court declined to rule upon appellants' motion for judgment but amended its original opin-

ion and remanded the case to the trial court for further proceedings consistent with the opinion. 487 F.2d at 378. On remand Rossmoor renewed its motions for judgment n.o.v. and new trial.

The trial court ruled that it was foreclosed by this court's opinion from entertaining the post trial motions and the second appeal to this court was taken, this time by the defendants. We held that the trial court was not foreclosed from entertaining the motions on their merits and remanded with instructions that appellants' motions be entertained. *Gough v. Rossmoor Corp.*, 533 F.2d 453 (9th Cir. 1975), *cert. denied*, 429 U.S. 857 (1976).

On the second remand the trial court denied the motions, ruling that the evidence was sufficient to permit the jury to find that there was a common plan between Rossmoor, Crestmark and the Foundation, under which the Foundation would cause the News to refuse to allow Rosen to advertise his carpets in the News, which plan was intended to lessen competition. Judgment was entered for Rosen in treble the damages found by the jury, with interest, costs and counsel fees. This appeal followed.

THE ISSUES

Appellants assign error in a number of respects,[2] with only two of which we shall concern ourselves. We find merit in appellants' contentions that appellee has failed to show

[2]In addition to the issues discussed appellants contend (1) that as integral parts of a single enterprise they are legally incapable of conspiracy; (2) that appellee has failed to prove conspiracy between Rossmoor and the Foundation; (3) that the evidence does not support the finding or amount of damages; (4) that hearsay evidence was improperly admitted.

violation either of §1 or §2 of the Sherman Act through failure to present evidence defining the relevant market and establishing that competition was unreasonably restrained in that market and that monopolization of the market was attempted.

Before reaching the merits of these issues we must dispose of two preliminary contentions of appellee.

Appellee first contends that these issues were not raised before the district court and, that by the interrogatories to the jury, appellants conceded that Leisure World is the relevant market. We disagree.

Unless the alleged anticompetitive conduct is *per se* unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case (as we shall discuss later), and the burden of establishing it lies on him. *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 627 (9th Cir. 1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Cataphote Corp. v. DeSoto Chem. Coatings, Inc.*, 450 F.2d 769, 773 (9th Cir. 1971), *cert. denied*, 408 U.S. 929 (1972). Lack of market definition is not a matter of affirmative defense that must be specifically pleaded.

Rosen, in his complaint, alleged that the market within which defendants' "monopolistic position" could be assessed was Leisure World; this allegation was denied. Rosen, in his pretrial brief, made reference to the evidence by which he proposed to establish that Leisure World was the relevant market. Following trial, in his argument to the jury, counsel for Rosen stated that the contested issue of relevant market pertained to Rosen's

claims under both § 1 and § 2. An instruction submitted by Rosen and objected to by appellants was given to the jury, reading in part:

> "The test here is whether the combination affects a definable marketing or trade area, and whether it unnaturally diverts the transportation of goods to or from that area."

As to the interrogatories, the jury was not asked to define the relevant market. The interrogatories assumed that Leisure World was the relevant market. When, as in this case, the jury verdict is in response to written questions upon the factual issues, the effect of a failure to present an issue to the jury is set forth in Rule 49(a), Federal Rules of Civil Procedure. That rule provides in part:

> "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Thus, here a court finding to the effect that Leisure World was the relevant market was essential if the jury's findings were to have any legal effect. Under the rule a finding to that effect is presumed and the question thus is whether there is evidence to support such a finding. In moving for judgment notwithstanding the verdict, both before this court and before the district court, appellants stressed the lack of evidence from which the relevant market could be defined.

We conclude that the question of relevant market definition was in the case from the outset and that failure to question the jury respecting the matter did not amount to a concession that Leisure World was the relevant market.

Appellees' second contention is that any question respecting relevant market has been resolved by law of the case; that our remands on the prior appeals indicated that the only question remaining was whether the evidence supported the verdict of the jury. Since, under Rule 49(a), the jury findings do not stand alone, we read the remands as calling for a decision on whether the evidence supported all applicable findings—those of the court as well as those of the jury. On the second remand, the district court considered the merits of appellants' post-trial motions for the first time and the appeal from the denial of those motions is now properly before this court.

We turn, then, to the merits of the issues before us: whether, through failure to define the relevant market, appellee has failed to establish either a restraint of trade under § 1 or an attempt to monopolize under § 2 of the Sherman Act.

A. *Unreasonable Restraint of Trade*

We turn first to § 1. This section does not concern itself with all injuries suffered by a competitor through unfair or overzealous competition. Such injuries are generally matters for state law. Section 1 of the Sherman Act is concerned with *restraints* on competition, and the competition with which the Act is concerned is more than that contributed by the plaintiff. To amount to an unrea-

sonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business. *See, e.g., Mutual Fund Investors v. Putnam Management Co., supra,* 553 F.2d at 627. As it has often been stated, "the antitrust laws * * * were enacted for 'the protection of *competition,* not *competitors* * * *.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977). The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged. In *Knutson v. Daily Review, Inc., supra,* 548 F.2d at 803, this court stated:

> "A termination is not unlawful because of some adverse effect on the distributor's business, even if the effect is the elimination of the distributor from the market. The complaining distributor must show that the refusal to deal was intended to or did bring about some restraint of trade beyond the loss of business suffered by the distributor or the market's loss of a distributor-competitor."

Certain classes of restraints have been held to be *per se* unreasonable. As stated in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958):

> "* * * there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable * * *."

Only four categories of restraints have been held to be *per se* unreasonable: horizontal and vertical price fixing;[3] horizontal market division;[4] group boycotts or concerted refusals to deal;[5] and tie-in sales.[6] Our first question is whether the restraint here fits any of these categories. It does not fit easily. The only prospect would appear to be the group boycott or concerted refusal to deal. There was indeed a refusal by the Foundation (through the News) to deal with Rosen in the sense that it refused to allow Rosen to advertise in the News. There is some evidence to support the jury's finding that a concert of action on the part of Rossmoor and Crestmark existed, which concert perpetrated the refusal to deal by the Foundation and for the purposes of this discussion we will assume that such an agreement existed.

Such concert of action may suffice to create a conspiracy but it cannot suffice to constitute such a concerted refusal to deal as has so far been held to be *per se* unreasonable. In all cases so far holding such restraints to be *per se*

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[3] *See, e.g., United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911).

[4] *See, e.g., United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

[5] *See, e.g., Silver v. New York Stock Exchange,* 373 U.S. 341 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

[6] *See, e.g., Northern Pac.Ry. v. United States,* 356 U.S. 1 (1958).

unreasonable, there has been some horizontal concert of action taken against the victims of the restraint. In *Mutual Fund Investors v. Putnam Management Co., supra,* this court rejected the contention that the refusal to deal there under fire constituted a *per se* illegal group boycott, stating "At issue is an alleged conspiracy among vertically integrated organizations and agreements among them are not *per se* illegal." 553 F.2d at 626.[7]

The Second Circuit has recently noted in its *en banc* decision in *Oreck Corp. v. Whirlpool Corp.,* F.2d (1978):

> "It is important to distinguish between 'horizontal restraints', i.e. agreements between competitors at the same level of market structure, and 'vertical restraints', i.e. combinations of persons at different levels of the market structure such as manufacturers and distributors. See *United States v. Topco, Associates,* 405 U.S. 596, 608 (1972). Horizontal restraints alone have been characterized as 'naked restraints of trade with no purpose except stifling competition.' *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963); and, therefore, *per se* violations of the Sherman Act."

..... F.2d at ..... *See also Sitkin Smelting & Refining v. FMC Corp.,* 575 F.2d 440, 446 (3d Cir. 1978).

In Sullivan, *Antitrust,* at 259 (1977), the author states: "If the *per se* rule respecting boycotts is to become coherent, we must recognize that it applies only where competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context." Here the concert of action was by a sole competitor and that competitor's parent company, and was in no way an agreement between competitors. The agreement, which only prevented advertising of carpets in the News, did not deprive Rosen of an element necessary to compete; other means of advertising, including other newspapers, were readily available.

We conclude that the restraint in our case does not fall within any of the four categories of *per se* violation so far recognized.

Appellee protests, however, that the restraint amounts to a denial of access to the Leisure World market;[8] that it is clearly anticompetitive in purpose with no competitive

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[7] *See Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n,* .. F.2d .., . . . n. 7 (9th Cir. Mar. 22, 1978) (discussing characteristics of boycotts considered illegal *per se*). Although the court in *Ackerman-Chillingworth* seems to classify *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), as a *per se* illegal group boycott by vertically integrated conspirators, it should be noted that the conspiracy did involve horizontal concert of action at the manufacturers' level and that it was the manufacturers who actually boycotted the plaintiff by refusing to sell their products to it.

The Second Circuit appears recently to have concluded that as a result of the decision in *Continental T.V. v. GTE Sylvania, infra* n. 9, no vertical restrictions save price fixing are *per se* illegal. *National Auto Brokers Corp. v. General Motors Corp.,* 572 F.2d 953 (2d Cir. 1978). *Accord, H & B Equipment Co. v. International Harvester Co.,* ... F.2d ..., ... [slip opin. p. 5296] (5th Cir. 1978). The court in *National Auto* affirmed a directed verdict for the defendants finding that the plaintiff had failed to meet its burden of showing that the challenged "fleet allotment" system, which assured each dealer of a minimum number of cars for resale, violated the rule of reason—that it was "unreasonable in view of 'the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.' *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918)." 572 F.2d at 960.

[8] As we note later, access to Leisure World was not denied. Access to the advertising columns of the News was denied, but that was all.

benefits claimed for it, and that this should be enough to constitute it *per se* unreasonable.

The caution exercised by the Supreme Court when a new category is sought to be added to those already recognized as *per se* unreasonable was demonstrated in *White Motor Co. v. United States,* 372 U.S. 253 (1963). There the Court considered whether vertical market division should be added. It refused to add it to the *per se* list, stating:

> "Horizontal territorial limitations, like '[g]roup boycotts, or concerted refusals by traders to deal with other traders' (*Klor's v. Broadway-Hale Stores, supra,* [359 U.S. at] 212), are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. * * * We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' (*Northern Pac. R. Co. v. United States, supra,* p. 5) and therefore should be classified as *per se* violations of the Sherman Act."

372 U.S. at 263.[9]

Thus, *White Motors,* and *Continental T.V. v. GTE Sylvania, supra* note 9, warn us that additions to the limited *per se* list are not to be made on an *ad hoc* basis. At least they are not to be made without evidence supporting a

[9] In *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), the Court arrived at the opposite result, holding that vertical market division was *per se* unreasonable. However, this decision was reexamined in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), and *Schwinn* was overruled. The Court stated:

> "When competitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act."

433 U.S. at 59. We discuss the rule of reason later in this opinion.

determination that the restraint is such as to have a pernicious effect on competition. We cannot say, as matter of law, that such would be the effect here. We do not even know the extent to which the restraint contributed to Rosen's business failure. There was no attempt to put him out of business or to prevent Leisure World residents from doing business with him (such as could have been achieved by a tie-in with the sale of mutual shares). The restraint was limited to depriving him of the right to communicate with the Leisure World residents through the advertising columns of the News. As we have noted, other newspapers and means of conveying his commercial message were still open to him, and accordingly he was not without suppliers of that which was denied to him by the refusal to deal. We cannot, without evidentiary support, credit any implied finding that deprivation of advertising in this one community newspaper had such a pernicious effect on competition within the relevant market (whatever that may be) as to warrant holding that restraint *per se* unreasonable.

We conclude that the conduct here in question cannot be said to be *per se* an unreasonable restraint of trade and a violation of § 1.

If the agreement or practice is not one of those conclusively presumed to be unreasonable, it must be proved to be unreasonable, and this, as noted in *Northern Pacific Railway Co., supra,* takes considerable proving. It is done by resort to what has come to be called the rule of reason.

At the time of its announcement in *Standard Oil Co. v United States,* 221 U.S. 1 (1911), and the elaboration of the rule by Mr. Justice Brandeis in *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918), to its latest articulation in *Continental T.V. v. GTE Sylvania,* 433 U.S. 36 (1977), *supra* note 9, the rule of reason has been primarily directed to a balancing of the competitive evils of the restraint against the competitive benefits asserted on its behalf.

However, the fact that no competitive benefits are advanced in favor of a restraint (as would seem to be the case here) does not automatically constitute it unreasonable under the Sherman Act. As we have already noted, it must first be established to be a restraint on competition and this involves a consideration of the impact of the restraint on the competitive conditions within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition within it. As one writer has put it:

> "It is the process of competition with which the Act is concerned, and a practice will not fall under its ban unless it displays an adverse impact on that process which is more than trivial."

Sullivan, *Antitrust,* at page 178.

Before this study can even be commenced, however, we must know with what field of competition we are concerned and the dimensions of that field. Market definition is essential. As the Supreme Court stated, in *Continental T.V. v. GTE Sylvania, supra:* "An antitrust policy divorced from market considerations would lack any objective benchmarks," 433 U.S. at 53 n. 21. Thus in determining the relevant market the courts are not free to accept whatever market is suggested by the plaintiff as fitting most persuasively with his contention that his power to compete effectively has suffered injury. *See, e.g., Knutson v. Daily Review, Inc., supra,* 548 F.2d at 803-04.

There is nothing in the record from which a finding can be based as to what the relevant market is in this case. The interrogatories given to the jury assume that the sale of carpets to the customers residing in Leisure World is the relevant market and we have necessarily implied a finding by the court to this effect. On its face this finding strikes us as a dubious one. We know that Crestmark is the only commercial establishment located in the Leisure World complex. The commercial district of Walnut Creek, in which Rosen was located, has not been defined. The relevant geographic market is determined, in part, by the area to which the purchaser can reasonably turn to obtain the product. *Case-Swayne Co. v. Sunkist Growers, Inc.,* 369 F.2d 449, 457-58 (9th Cir. 1966), *rev'd on other grounds,* 389 U.S. 384 (1967); *see* Sullivan, *Antitrust,* at 68. Here we do not know the extent to which this or other commercial districts within reach were patronized by the Leisure World residents or the ratio their patronage bears to that of other Walnut Creek customers.

We conclude that appellee cannot prevail under the rule of reason for failure to prove relevant market and an injury to competition within that market. For failure of proof in this respect appellants were entitled to judgment notwithstanding the verdict on appellee's claim under § 1.

B. *Attempt to Monopolize*

Turning to § 2 of the Act we are confronted by appellee's allegation that the perpetration by Rossmoor and Crestmark of the Foundation's denial of advertising space was pursuant to an attempt on the part of Rossmoor and Crestmark to monopolize the Leisure World market in carpets.[10] Appellee points out that under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), when an attempt to monopolize is charged it is not necessary to establish market power on the part of the would-be monopolist as is required when the claim is that monopolization has actually been achieved, and accordingly that

> "When the charge is attempt (or conspiracy) to monopolize rather than monopolization the relevant market is 'not in issue.'"

327 F.2d at 474.

Since *Lessig*, the extent of proof required to establish an attempt to monopolize has been before this court on many occasions.[11] The most recent pronouncement of the prima facie requirements is provided by *Janich Bros., Inc. v. American Distilling Co., supra*, n. 11. This court held there that a plaintiff must prove three elements: (1) specific intent to control prices or destroy competition

[10]The jury was instructed concerning both § 1 and § 2 of the Sherman Act and we assume herein that the jury's answer to special interrogatory No. 1 constitutes a finding in favor of appellee on the attempt to monopolize claim.

[11]*Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1973); *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8, 11-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); *Knutson v. Daily Review, Inc., supra*, 548 F.2d at 813-15; *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (U.S. Jan. 17, 1978); *Janich Bros., Inc. v. American Distilling Co.*, 570 F2d 848 (9th Cir 1977); *Marquis v. Chrysler Corp.*, ... F.2d ... (9th Cir. June 29, 1978).

with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. 570 F.2d at 853. *See also Marquis v. Chrysler Corp., supra*, n. 11. We pointed out, however, that this circuit has allowed a "short-cut method" of establishing liability, in that proof of probability of success can be supplied by inference drawn from proof of specific intent and that proof of specific intent can in turn be supplied by inference drawn from proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade. *Janich, supra*, 570 F.2d at 854. To the same effect is *Knutson, supra*, 548 F.2d at 814; *Greyhound Computer, supra* n. 11, 559 F.2d at 504 n. 37.

The question thus is whether an inference of intent to monopolize the trade in carpets with residents of Leisure World can be drawn from the action taken here: causing the Foundation to bar Rosen from advertising in the News. This was not predatory. There is no indication that Crestmark intended to put Rosen out of business. This being so, no inference of intent to monopolize can be drawn from the anticompetitive conduct in question unless it amounted to an unreasonable restraint of trade under § 1. While conduct which would, in the case of a conspiracy, amonut to a *per se* violation of § 1 would constitute an unreasonable restraint of trade without proof of market or market power, under the rule of reason market definition is required to establish a § 1 viola-

tion, as we have previously noted. Thus, in the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of § 1 to prove an attempt to monopolize.[12] Without these limitations the door to a § 2 attempt would be open far wider than necessary to meet the concerns expressed by this court in *Greyhound Computer,* [13] *supra,* and could permit treble damage recovery where no remote possibility of monopolization would appear to exist and where the impact on competition of the conduct in question is limited to its impact on the plaintiff.

We conclude that no inference of intent to monopolize can be drawn from the anticompetitive conduct here in question, and that appellants were entitled to judgment notwithstanding the verdict on appellee's claim under § 2.

Judgment reversed.

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[12] *Janich* puts it even more strongly:

"Where a plaintiff relies only upon a defendant's conduct to establish an attempted monopolization claim and does not show market power, specific intent to monopolize should ordinarily be inferred only where the alleged conduct is of a kind clearly threatening to competition or clearly exclusionary."

570 F.2d at 854 n. 4.

[13] The court in *Greyhound Computer* was concerned that:

"A single firm that did not control something close to 50 percent of the entire market, see *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., supra,* 512 F.2d at 1275, would be free to indulge in any activity however unreasonable, predatory, destructive of competition and without legitimate business justification. Any concern not dangerously close to monopoly power could deliberately destroy its competitors with impunity."

559 F.2d at 504.

"More specifically, there is support in the decisions and legislative history for the conclusion that § 2 was intended to prohibit unreasonable restraints of trade that exclude competition even when they are imposed by a single trader."

559 F.2d at 504 n. 37.

CHOY, Circuit Judge, concurring:

I concur in the majority opinion. However, I must make one observation about the extent of proof necessary to establish an attempt to monopolize claim. I agree with my Brothers that three elements are necessary for a prima facie claim: (1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. We have so held in *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), and *Marquis v. Chrysler Corp.*, ...F.2d ....., ... (9th Cir. 1978) (Nos. 75-2815, 75-2881 and 75-3944, June 29, 1978) (slip opinion at 2142).[1]

But in *Greyhound Computer Corp. v. International Business Machines*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (U.S. Jan. 17, 1978), we held that only two elements were necessary. We stated that "[a] prima facie case of attempt to monopolize is made out by evidence of a specific intent to monopolize 'any part' of commerce [element (1)], plus anticompetitive conduct directed to the accomplishment of that unlawful purpose [element (2)]." *Id.*

However, by holding that Crestmark's actions were neither predatory nor anticompetitive, we need not inquire

---

[1] I also agree that this Circuit recognizes a "short-cut method" of establishing liability by inferences drawn from proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade. *See Janich Bros.*, 570 F.2d at 854.

into what additional element or elements would be necessary for a successful claim.

HERBERT Y. C. CHOY
UNITED STATES
CIRCUIT JUDGE

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 77-2047

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,
vs.
Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[Filed October 27, 1978]

ORDER

Before: MERRILL, KILKENNY and CHOY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing; Judge Choy has voted to reject the suggestion for a rehearing en banc and Judges Merrill and Kilkenny have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff,
vs.
Rossmoor Corporation, et al.,
Defendants.

[Entered February 23, 1977]

JUDGMENT FOR PLAINTIFF

The above entitled action having been tried before the Honorable Elbert P. Tuttle, Judge, by designation, and a jury, commencing March 16, 1970; and the jury having answered the following stated interrogatories in the following ways:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan, scheme or design have the power and intention to exclude plaintiff from the carpet and/or business in Rossmoor Leisure World?

Yes Yes

No .....

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising

carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes Yes

No .....

3. If your answer to either of the preceding questions is in the affirmative did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes _____

No No

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes Yes

No .....

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,149
Goodwill	$22,738

And the United States Court of Appeals for the Ninth Circuit having on October 17, 1973 filed its opinion holding upon the facts and the law applicable to this case, the defendants are within the provisions of the Federal antitrust laws, specifically Section 4 of the Clayton Act, 15 U.S.C. § 15; and the said Court having on December 28, 1973 amended its opinion.

And the Mandate of the United States Court of Appeals for the Ninth Circuit having issued on March 12, 1974, and

the revised opinion of the United States Court of Appeals for the Ninth Circuit stating:

> "The judgment is vacated and the cause remanded for further proceedings consistent with this opinion."

And the plaintiff having filed his motion to enter judgment based upon the answers to the aforesaid interrogatories and upon the aforesaid opinion of the United States Court of Appeals for the Ninth Circuit; and the defendants having heretofore presented to the Court of Appeals in their petition for rehearing their contentions of fact and law which they urge in support of a judgment notwithstanding the verdict and a motion for a new trial;

And the United States Court of Appeals for the Ninth Circuit having denied defendants' petition for rehearing;

And this Court having concluded that the judgment of the United States Court of Appeals determined the matters raised by defendants on the merits by reason of the denial of the petition for rehearing;

And this Court having granted judgment for plaintiff on October 30, 1974, filed November 4, 1974;

And the defendants having appealed to the United States Court of Appeals for the Ninth Circuit on the ground that the Court of Appeals did not preclude a determination on the merits and that Court having filed its opinion on March 17, 1976, remanding the cause for the trial Court's consideration of the merits of defendants' motions for judgment *n.o.v.* and new trial;

And this Court having reviewed the record and having entered its ruling that the evidence was sufficient to warrant the jury's finding of the existence of a conspiracy in

violation of the Sherman Act and overruling the motion for a verdict *n.o.v.* and denying motion for a new trial, said ruling having been filed on the ..... day of January, 1977.

And it appears that plaintiff is entitled to judgment;

It Is Hereby Ordered, Adjudged and Decreed:

The judgment filed November 4, 1974 for the plaintiff, Kerry M. Gough, Trustee in Bankruptcy for Louis Rosen, d/b/a Walnut Creek Furniture, and against defendants Rossmoor Corporation and Crestmark Carpet and Drapery Co. is valid and enforceable, and pursuant thereto that:

(1) The plaintiff Kerry M. Gough have and recover from defendants Rossmoor Corporation and Crestmark Carpet and Drapery Co. the sum of $122,643, which is threefold the damages found by the jury to be suffered by plaintiff, with interest thereon at the rate of 7% as provided by law.

(2) Defendants shall pay reasonable attorneys' fees pursuant to Section 4 of the Clayton Act and said sum shall be $50,000.00 for the period until October 30, 1974.

(3) The sum of $1,400.00 for plaintiff's costs and disbursements in this action, pursuant to stipulation between the parties, for the period until October 30, 1974.

(4) And the sum of $3,457.00 for plaintiff's costs and disbursements on the first appeal to the United States Court of Appeals and as to which a partial satisfaction of judgment has been filed with this court.

That this judgment further be entered for plaintiff Kerry M. Gough, Trustee in Bankruptcy for Louis Rosen, d/b/a Walnut Creek Furniture, and against defendants Rossmoor

Corporation and Crestmark Carpet and Drapery Co. for the following:

(1) Defendants shall pay additional reasonable attorneys' fees pursuant to Section 4 of the Clayton Act to cover the preparation and filing of memorandum in this Court in support of the jury's answers to interrogatories pursuant to the Court's order dated March 29, 1976 in the sum of $6,000.00.

(2) The sum of $400 for plaintiff's costs and disbursements in this action subsequent to October 30, 1974.

Accordingly, judgment is hereby rendered in the amount of $183,504.00 in the favor of plaintiff.

Dated at Atlanta, Georgia, this 14th day of February, 1977.

/s/ Elbert P. Tuttle
United States Court of Appeals
Circuit Judge, Sitting by
Designation in the United States
District Court for the Northern
District of California.

Approved As To Form:

/s/
Pettit, Evers & Martin

Appendix D

United States District Court
Northern District of California

No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, d/b/a Walnut Creek Furniture,

Plaintiff,

vs.

Rossmoor Corporation, et al.,

Defendants.

[Filed February 23, 1977]

ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ALTERNATIVELY FOR A NEW TRIAL

The principal basis for the defendant's motion for a judgment n.o.v. is that there was insufficient evidence for the Court to submit to the jury the question of the existence of "a common plan, scheme or design between the defendants and Leisure World Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World."

The defendant Rossmoor Corporation was owned 95% by Ross Cortese. It is the sole owner of the other defendant Crestmark Carpet and Drapery Company. The defendant

Rossmoor was the developer and builder of the Rossmoor Leisure World at Walnut Creek, a residential community in which nearly 3,000 units had been sold at the time of the events made the basis of this litigation. The Leisure World Foundation was the entity which created the "mutuals," each consisting of a substantial number of residential units which then borrowed the construction money for the units to be built and, then, acting for the mutuals, contracted with Rossmoor to build the units. The Foundation also held a management contract for the management of the Leisure World at Walnut Creek, that is, operating the common facilities utilized in connection with the making of Leisure World a complete community. It leased substantial space in its headquarters building to Rossmoor's wholly-owned subsidiary, Crestmark Carpet and Drapery Company. The interrelationship of these entities is further emphasized by the fact that the initial capital of Leisure World in the sum of $1,000,000 was obtained by a bank loan guaranteed by Cortese who was also president of Rossmoor and of Crestmark.

The act of Leisure World in notifying the plaintiff Rosen that it would no longer carry his advertisement for carpets and that no such advertisements would be carried except for Crestmark was contrary to the uniform recommendation of the persons actually operating the newspaper. It clearly entailed loss of advertising income and thus entailed a loss to Leisure World Foundation, its owner. It would, of course, help Crestmark, and its parent corporation Rossmoor and its owner Cortese.

While there is no direct evidence that the two defendants made a formal commitment to each other that they would

cause the Foundation to terminate Mr. Rosen's advertising, the fact that all of Cortese's interests would benefit by such action and that the Foundation would suffer would permit the jury to infer that such common purpose existed. The potential for giving effect to such a purpose appears from the testimony of Mr. Cortese who, at one point in his testimony, identified himself with Leisure World Foundation when its chief administrator, Robert Nelson was hired.

The following questions and answers occurred on page 1084-1085 of the transcript.

"MR. KEITH: Q. When did you first start going from Laguna Hills or the Southern California area to Walnut Creek?

A. After I purchased the property.

Q. Do you recall when that was?

A. '63.

Q. Then there came a time that an administrator was appointed through Leisure World Foundation to run the project, is that correct?

A. That is correct.

Q. What did you know about the subject matter?

A. Nothing.

Q. But you came at one point in time, you say in 1964, probably, and you met Mr. Nelson, is that correct?

A. Met him when *we* hired him. I don't recall the date or the year that he was hired.

MR. KEMP: Mr. Cortese, speak up.

MR. KEITH: Q. Who is *we*?

A. *The Leisure World Foundation.*" [Emphasis added.]

It is true that Mr. Cortese subsequently changed his testimony and said: "It wasn't my prerogative to hire Mr. Nelson. It was the prerogative of the Leisure World Foundation. We had nothing to do with it." However, in light of all the other circumstances testified to concerning the interrelationship between the several parties, it is clear that the jury could have inferred that when Mr. Cortese stated that he met Mr. Nelson "when *we* hired him" he was speaking the truth, *i.e.,* that he had a part, with the Foundation, in hiring its administrator. The significance of this fact is plain since it was Mr. Nelson who gave the orders to the newspaper people to cut off the plaintiff's advertising.

I conclude that the evidence adduced on behalf of the plaintiff was sufficient to permit the jury to infer that there was a common purpose and design between the two defendants and Leisure World Foundation to cause the latter to cut off the plaintiff's advertising of carpets in the Leisure World News with the intent to deprive him of an opportunity to compete for this substantial interstate business.

Having found that there was sufficient evidence to warrant the jury's finding the existence of a conspiracy in violation of the Sherman Act, objections to testimony touching on statements of co-conspirators should be overruled. Such evidence is admissible.

I also conclude that the evidence touching on the plaintiff's damages was sufficient to warrant the jury's consideration and determination.

The motion for verdict n.o.v. is overruled as is also the motion for new trial.

This 14th day of February, 1977.

/s/ ELBERT P. TUTTLE
United States Circuit Judge
Sitting by designation

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 75-1138
75-1139

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,
vs.
Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[March 17, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WRIGHT and KILKENNY, Circuit Judges, and CHRISTENSEN,* Senior District Judge.

WRIGHT, Circuit Judge:

This antitrust case appears before us for the second time. At trial the jury returned a verdict for defendant Rossmoor through answers to special interrogatories. On appeal this court determined that one of the interrogatories was improperly submitted to the jury and that the

*Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

jury's answer was wrong as a matter of law. With this answer disregarded, all remaining jury answers were in favor of plaintiff Gough. *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973).

This court originally directed that

> [i]n view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed and the cause remanded for this purpose.

Rossmoor petitioned for rehearing and included within that petition motions for judgment n.o.v. and new trial. The petition was denied, without reference to the motions included therein. However, this court modified the order quoted above, to read as follows:

> The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

487 F.2d at 378.

On remand, Rossmoor renewed its motions for judgment n.o.v. and new trial. The trial judge, believing that he was foreclosed by our modified opinion from exercising his discretion as to these motions, denied both of them.

The sole issue presented is whether the trial judge correctly determined that our order remanding "for further proceedings consistent with this opinion" foreclosed his subsequent exercise of discretion on the motions for judgment n.o.v. and new trial. We hold that he did not.

That this court might have considered the motions for judgment n.o.v. and new trial on their merits is made clear by the Court in *Neely v. Eby Construction Co.*, 386 U.S. 317, 323 (1967). However, more often than not this court

should refer such motions, arising for the first time on appeal, to the trial court so that it can first pass on them. *Id.* at 323-26. *See also Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967).

Unless this court expressly or by clear implication disposes of motions raised for the first time on appeal, it must be presumed that they will be acted upon by the trial court on remand. The above rule is necessary to insure that *some* court consider the merits of the motions which a party is entitled to present.

In the first appeal of the instant case, this court neither expressly nor by clear implication ruled on the motions presented in the rehearing petition. To the contrary, the modification of the order from one requiring that "judgment . . . [be] entered for plaintiff" to one remanding "for further proceedings consistent with this opinion" strongly implied that the motions were to be entertained below on remand.

Gough directs our attention to certain language in our earlier opinion regarding the jury's factual findings on (a) power and intent to exclude, and (b) damages. We said those findings "established, as a matter of law," that defendants had engaged in illegal conduct which injured plaintiff. 487 F.2d at 376. Gough argues that by this language the court effectively denied the motions for judgment n.o.v. and new trial. We disagree.

Read in context, the use of the term "matter of law" suggests that the factual issues of power and intent, and damages, were as a matter of law properly presented to the jury. By contrast, the interstate commerce issue should not

have been submitted to the jury, since "[t]he undisputed facts established that the necessary relationship to interstate commerce did exist." 487 F.2d at 377.

Nowhere in the course of the opinion preceding the phrase "matter of law" does this court set forth the evidence in such a way as to support a conclusion that the jury *must*, "as a matter of law," have found for plaintiff. Therefore, the "matter of law" language may mean that if the jury's answers were properly based on adequate evidence, the judgment must under law be for the plaintiff. If this interpretation is correct, the trial judge must now decide, in entertaining the motions for judgment n.o.v. and new trial, whether the evidence supported the jury's answers.

Assuming, without deciding, that Gough is correct in interpreting the "matter of law" language as being in effect a denial by this court of the motions presented, we would still reverse. The number of possible interpretations of the "matter of law" language suggests that none of them is supported by "clear implication." Thus the interpretation suggested by Gough, even if correct, cannot foreclose the exercise of discretion by the trial judge on remand.

Since the trial judge acted on the mistaken assumption that he could not adjudge the motions for judgment n.o.v. and new trial, we must remand so that he may do so. *See Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951).

The cause is remanded for the trial judge's consideration of the merits of Rossmoor's motions for judgment n.o.v. and new trial.

Appendix F

United States District Court
Northern District of California

No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,

Plaintiff,

vs.

Rossmoor Corporation, et al.,

Defendants.

[Filed November 4, 1974]

JUDGMENT FOR PLAINTIFF

The above entitled action having been tried before the Honorable Elbert P. Tuttle, Judge, by designation, and a jury, commencing March 16, 1970; and the jury having answered the following stated interrogatories in the following ways:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan, scheme or design have the power and intention to exclude plaintiff from the carpet and/or business in Rossmoor Leisure World?

Yes Yes

No _____

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or

Golden Rain Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes Yes

No _____

3. If your answer to either of the preceding questions is in the affirmative did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes _____

No No

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes Yes

No _____

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143
Goodwill	$22,738";

And the United States Court of Appeals for the Ninth Circuit having on October 17, 1973 filed its opinion holding upon the facts and the law applicable to this case, the defendants are within the provisions of the Federal antitrust laws, specifically Section 4 of the Clayton Act, 15 U.S.C. § 15; and the said Court having on December 28, 1973 amended its opinion;

And the Mandate of the United States Court of Appeals for the Ninth Circuit having issued on March 12, 1973, and the revised opinion of the United States Court of Appeals for the Ninth Circuit stating:

> "The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.";

And the plaintiff having filed his motion to enter judgment based upon the answers to the aforesaid interrogatories and upon the aforesaid opinion of the United States Court of Appeals for the Ninth Circuit; and the defendants having heretofore presented to the Court of Appeals in their petition for rehearing their contentions of fact and law which they urge in support of a judgment notwithstanding the verdict and a motion for a new trial;

And the United States Court of Appeals for the Ninth Circuit having denied defendants' petition for rehearing;

And it appearing that plaintiff is entitled to judgment,

It Is Hereby Ordered, Adjudged And Decreed:

That judgment be entered for the plaintiff, Kerry M. Gough, Trustee in Bankruptcy for Louis Rosen, d/b/a Walnut Creek Furniture, and pursuant thereto that:

(1) The plaintiff Kerry M. Gough have and recover from defendants Rossmoor Corporation and Crestmark Carpet and Drapery Company the sum of $122,643, which is threefold the damages found by the jury to be suffered by plaintiff, with interest thereon at the rate of 7% as provided by law.

(2) Defendants shall pay reasonable attorneys' fees pursuant to Section 4 of the Clayton Act and said sum shall be $50,000.00.

(3) The sum of $..... for plaintiff's costs and disbursements in this action.

(4) The sum of $3,457.72 for plaintiff's costs and disbursements on appeal, consisting of the following:

(a) $971.52 for costs as shown in the Mandate of the United States Court of Appeals for the Ninth Circuit;

(b) $2,486.20 being additional costs taxed in the United States District Court in connection with the appeal, pursuant to F.R.A.P. 39(e).

Accordingly, it is hereby ordered that the final judgment in the amount of $122,643 be entered on behalf of the plaintiff, together with costs in the amount of $_____ and attorneys' fees in the amount of $50,000.00.

Dated at Atlanta, Georgia, this 30th day of October, 1974.

/s/ Elbert P. Tuttle
Elbert P. Tuttle
United States Court of Appeals
Circuit Judge, Sitting by
Designation in the United States
District Court for the Northern
District of California.

Appendix G

In The United States District Court
For the Northern District of California

Civil No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff,
vs.
Rossmoor Corporation, et al.,
Defendants.

[Filed October 8, 1974]

JUDGMENT ON MANDATE
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

This case originally came on for trial before a jury upon interrogatories agreed upon between the parties. The interrogatories and the answers given to them by the jury were as follows:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

"Yes.

"2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from

advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

"Yes.

"3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

"No.

"4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

"Yes.

"5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

"Net Profits	$18,143.00
"Goodwill	22,738.00"

It is apparent that the jury made findings to the effect that the defendants and others had the power and design to and actually did engage in conduct which acted as a restraint on the plaintiffs' business of selling carpets or other merchandise at the locale involved. It is also clear that the jury determined the monetary loss suffered by the plaintiffs by reason of such conduct.

It is equally apparent that by answering question number three in the negative the jury indicated that such restraint did not have "a substantial effect on interstate commerce or the flow of interstate commerce."

On appeal the Court of Appeals for this Circuit held that the answers to the interrogatories other than interrogatory number three made irrelevant the jury's response to that interrogatory. The Court stated:

> "For it is clear that the defendants' anticompetitive conduct in connection with such sales necessarily had the 'substantial economic effect' upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a 'substantial' volume of carpeting from the states of manufacture to the Walnut Creek California area, citing Cartrade, Inc. v. Ford Dealers' Advertising Association, *supra,* 446 F.2d at 292."

The Court of Appeals therefore set aside the judgment in favor of the defendants which had been entered by this Court based upon the jury's responses to the interrogatories.

In its original order the Court of Appeals stated:

> "In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose."

Thereafter, the original defendants, the appellees, filed a document entitled Appellees' Petition for Rehearing Including Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Suggestion of Appropriateness of Rehearing En Banc. That document not only undertook to reargue the merits of the original appeal, but also, as indicated in the title, contended that the trial court had erred in not granting their motion for directed verdict and pursuant to what they contended to be the

teaching of Neeley v. Martin K. Eby Construction Co., 386 U.S. 317, they urged that the Court of Appeals itself enter an order by way of judgment notwithstanding the verdict. Further, also relying upon the *Neeley* case they urged that the Court of Appeals order the grant of a new trial.

These two parts of the motion were based upon allegations that there was not sufficient evidence to sustain the jury's finding of a conspiracy or the other elements of an alleged anti-trust violation and further that there was insufficient evidence to sustain the jury's verdicts as to the damages sustained from the anti-trust violations which they found to exist.

Upon consideration of the petition the Court of Appeals modified the last paragraph of the opinion by striking the two sentences quoted above and substituting the following as a separate paragraph:

> "The judgment is vacated and the cause remanded for further proceedings consistent with this opinion."

The order then ended with the following language.

> "The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

The appellant, the original plaintiff in the action, has now filed his motion in this Court to enter a judgment in his favor for the amount of damages ascertained in the jury's verdict, contending that this is the only action available to the Court under the remand from the Court of Appeals. To the contrary, appellees, the original defendants, contend that they may now have heard by the trial court a new motion for judgment notwithstanding the verdict and their motion for a new trial as an alternative.

The answer to this question seems to have been resolved against the contention of the defendants-appellees by their contentions presented to the Court of Appeals in connection with their petition for rehearing. Part III and Part IV of their petition urged the Court of Appeals to enter a judgment n.o.v. or, in the alternative, an order granting a new trial. They based their contention that this was a proper procedure on the case of Neeley v. Martin K. Eby Construction Co., *supra,* and especially the *Neeley* case discussion of Federal Rule 50(d).[1] Although the rule itself states only that in the case of a party positioned as were the parties here, the appellees had open to them the right to argue that the judgment in their favor should have stood even though this Court incorrectly applied the jury verdict, by the process of requesting the appellate court to grant a new trial, the language of the Supreme Court extends to an appellee under such circumstances the further right to seek in the Court of Appeals an order for a judgment n.o.v. The Court said:

> "Rule 50(d) is applicable to cases such as this one where the trial court has denied a motion for judgment n.o.v. [After the jury verdict responding to the special interrogatories was filed the appellant here, the original plaintiff, filed a motion for judgment n.o.v.

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[1]Rule 50(d) provides:

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. As amended Jan. 21, 1963, eff. July 1, 1963." Rule 50(d) Fed. R. Civ. P.

and for new trial. Both of these motions were denied by the trial court.] Rule 50(d) expressly preserves to the party who prevailed in the district court [Here the appellees.] the right to urge that the Court of Appeals grant a new trial should the jury's verdict be set aside on appeal. Rule 50(d) also emphasizes that 'nothing in this rule precludes' the Court of Appeals 'from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.' Quite properly, this rule recognizes the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless consideration of the new trial question 'in the first instance' is lodged with the Court of Appeals and Rule 50(d) is permissive in the nature of its direction to the Court of Appeals: As in Rule 50(c)(1) *there is nothing in Rule 50(d) indicating that the Court of Appeals may not direct entry of judgment n.o.v. in appropriate cases.*" 386 U.S. 317, 323-324. (Emphasis added).

This course of events is precisely what happened in this case. The plaintiff Rosen, complaining of the Court's interpretation of the jury verdict, filed a motion for judgment n.o.v. and for new trial. These motions were denied. Thus, the present appellees were the prevailing party on that motion. Rule 50(c) expressly authorizes them to raise in the Court of Appeals all of the contentions that they now seek to make here which would authorize either a new trial or a judgment in their favor based on the theory that there was insufficient evidence to take the case to the jury in the first place. Of course, all other grounds for the granting of a new trial, such as objections to either the admission or refusal of the admission of evidence, the

measure of damages and the like would properly be contained in such motion.

In their motion for rehearing the appellees stated:

"The [appellate] court may either order a new trial itself or return the case to the district court for a ruling on the motion." Citing *Neeley* at 328-24, 325 (sic).

In the language of the Court on page 329 it seems to be decisive on the point.

"In our view, therefore, Rule 50(d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the Court of Appeals. If he does so in his brief—*or in a petition for rehearing if the Court of Appeals has directed entry of judgment for appellant*—the Court of Appeals *may make final disposition of the issues presented,* except those which in its informed discretion should be reserved for the trial court. If appellee presents no new trial issues in his brief or in a petition for rehearing, the Court of Appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case. *Compare* Weade v. Dichmann, Wright and Pugh, Inc., *supra.*"

Here the order of the Court of Appeals stated unequivocally, following consideration of the petition for rehearing, "the petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

Thus, it is clear that the Court of Appeals declined to grant the petition for the entry of a judgment n.o.v. or

the petition for the grant of a new trial. Neither did the Court determine that these questions should be remanded to the trial court for consideration. This Court construes the order of the Court of Appeals as having decided these issues on the merits, inasmuch as they were presented in full and denied by the Court.

The Court concludes that the judgment in favor of the defendants heretofore entered must be VACATED and judgment entered in favor of the plaintiff for three times the amount determined by the jury, together with costs and attorney's fees.

Appendix H

In the United States District Court
For the Northern District of California

No. 45531-GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture
Plaintiff,

vs.

Rossmoor Corporation, et al.,
Defendants.

[Filed December 6, 1974]

ORDER

Defendants having moved the court for judgment notwithstanding the verdict and for a new trial, the court having considered the motions,

IT IS ORDERED that said motions be and the same are hereby Denied.

Dated: December 3, 1974.

Elbert P. Tuttle
Elbert P. Tuttle
United States Circuit Judge
(sitting by designation)

Appendix I

United States Court of Appeals
For the Ninth Circuit

No. 26,475

Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellant,

vs.

Rossmoor Corporation, Golden Rain Foundation, Leisure World Foundation, and Crestmark Carpet and Drapery Company,
Defendants-Appellees.

[Filed October 17, 1973]

Appeal from the United States District Court
For the Northern District of California

Before: BROWNING, DUNIWAY, and GOODWIN, Circuit Judges

BROWNING, Circuit Judge:

Plaintiff sued defendants for treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) for violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The case was submitted to the jury on special interrogatories. The jury responded that defendants had entered into a conspiracy to exclude plaintiff from the business of selling at retail in a local market products produced in

other states, that they had restrained plaintiff's retail business to his damage, but that their acts had not had "a substantial effect on interstate commerce or the flow of interstate commerce." Because of this negative answer regarding the effect of defendants' conduct on interstate commerce, the district court entered judgment for defendants. We reverse.

Plaintiff was sole proprietor of a retail store selling carpets, drapes, and household furniture in Walnut Creek, California. Defendants are two members of a group of corporations that buy and sell land and construct, sell, furnish, and manage residential developments. These developments are referred to individually and collectively as "Rossmoor Leisure World."

Defendant Rossmoor Corporation is the primary developer. Defendant Crestmark Carpet and Drapery Company is a wholly owned subsidiary of Rossmoor that sells carpets and drapes to residents of Rossmoor Leisure World, including the development in the Walnut Creek area.

All the carpeting sold by plaintiff and defendant Crestmark to residents of the Walnut Creek Rossmoor Leisure World during the relevant period was manufactured outside California and shipped to plaintiff and defendant Crestmark either directly or through in-state wholesalers.[1]

[1]Defendant Crestmark's sales of carpeting and padding to residents of Rossmoor Leisure World at Walnut Creek exceeded $380,000 in 1965, $565,000 in 1966, and $305,000 in 1967. The volume of plaintiff's sales of carpeting to residents of the development is not entirely clear from the record, but defendants conceded at oral argument that such sales were not *de minimis*. Moreover, plaintiff testified, and the jury necessarily found, that such sales would have been substantially greater but for defendants' acts.

In response to interrogatories submitted under Rule 49(a), Fed. R. Civ. P., the jury found that defendants and their subsidiaries had the power and intention to exclude plaintiff from the business of selling carpeting to residents of the Walnut Creek Rossmoor Leisure World; that they entered into a scheme to prevent plaintiff from advertising in the Leisure World News, a "house" newspaper for that development, "such as to act as a restraint on plaintiff's business"; and that, as a result, plaintiff suffered some $50,000 damages in loss of profits and good will. However, to the question "Did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?" the jury answered "No."[2] Judgment was entered for defendants on the ground that this last answer deprived the court of jurisdiction under the Sherman Act.

[2]The written submission to the jury read as follows:

The following questions are being submitted to you for your answer in order to aid the Court in reaching a decision in this matter.

You should recognize that your answers to these questions will be the basis for the Court's decision which will decide whether or not the plaintiff is entitled to recover or not from the defendants.

You are to answer the following interrogatories as applicable. Before any question may be answered, all 12 of the jurors must agree on the answer.

1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

Yes X

No .....

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising carpets in the

The jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given defendant's conduct was of the kind prohibited by the Act. *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521-24 (9th Cir. 1973). The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558-59 (1944). The jurisdictional question, therefore, is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Rasmussen v. American Dairy Ass'n, supra*, 472 F. 2d at 521. This, in turn, depends upon whether defendants'

Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes X
No .....

3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes .....
No X

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes X
No .....

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143.00
Goodwill	22,738.00

conduct had a "substantial economic effect" upon interstate commerce, or, " 'concerns more States than one' and has a real and substantial relation to the national interest" in a competitive economy. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964), *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824); *see Rasmussen v. American Dairy Ass'n, supra*, 472 F.2d at 522-23. *See, generally*, 1 von Kalinowski, Antitrust Laws & Trade Regulation § 5.01[4](1969).

The substantive issue, on the other hand, is whether defendants participated in anticompetitive conduct of the kind encompassed within the statutory terms "restraint of trade," "monopolize," or "attempt to monopolize." In terms of this case, the substantive question was whether defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News, and, if so, whether such conduct was the kind of anticompetitive conduct prohibited by the Act.

Thus, although the substantive and jurisdictional issues are often confusingly described in terms of the "effect" of particular conduct upon commerce, as if a common question were presented, *see, e.g., Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 739-40 n.3 (9th Cir. 1954), the substance of the two inquiries is quite different. An unreasonable restraint on competition may have no impact upon interstate commerce, or an impact so insignificant that regulation under the Commerce Clause is not justified as a means of protecting interstate commerce. *Page v. Work*, 290 F.2d 323, 331-32 (9th Cir. 1961). Or con-

duct clearly having a substantial economic impact on interstate commerce may not violate the Act's prohibitions against unreasonable restraints of trade and monopolization. *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289, 292 (9th Cir. 1971).

When the issue is whether the defendant's conduct violates the norms of the statute, the focus is upon commercial competition: whether the defendant's conduct--"in" or "affecting" interstate commerce or not—unreasonably restrains competition in the market place. When the issue is whether jurisdiction exists, the focus is upon interstate commerce: whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause.

In the present case, the jury's factual findings that defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News established, as a matter of law, that defendants had engaged in the type of anticompetitive conduct that Congress intended to prohibit by the Sherman Act. The jury's further findings that plaintiff suffered monetary damages in a determined amount by reason of defendants' conduct, established, as a matter of law, that plaintiff was among the class of private persons authorized by the Clayton Act to seek redress for such conduct. Defendants do not argue to the contrary.

The sole question herein is jurisdictional: did defendants' conduct have a sufficient relationship to interstate commerce to be within Congress' power to regulate, and hence to come within the Sherman Act?

Defendants argue that the jury's specific finding that defendants' acts did not have a "substantial effect on interstate commerce or the flow of interstate commerce" is conclusive of jurisdiction. We disagree.

It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually "completely intermeshed," *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 362-63 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits. *See Page v. Work, supra*, 290 F.2d at 334; *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F.Supp. 705, 714 (D.C. Hawaii 1964); 5 Wright & Miller, Federal Practice & Procedure § 1350, at 556-58, 5 Moore's Federal Practice ¶ 38.37 [2.-2], at 298-300; *but see Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934 (9th Cir. 1959).[3]

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[3]Professor Moore summarizes the policy considerations supporting this view as follows:

> As a matter of policy, however, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation. The difference is this: if coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which underlying facts are not in dispute, but different inferences

Even assuming, however, that the resolution of conflicts in the evidence as to jurisdictional facts is the function of the jury, the jury must be given adequate instructions as to the legal standard to be applied. *Ratigan v. New York Central R.R.*, 291 F.2d 548, 554 (2d Cir. 1961); 5A Moore's Federal Practice, *supra*, ¶ 49.02, at 2206 n.7; 9 Wright & Miller, Federal Practice & Procedure, *supra*, § 2506, at 502. The interrogatory submitted to the jury in this case (question "3," *supra* note 2) did not inform the jury of the constitutional tests for determining whether the relationship between defendants' conduct and interstate commerce was such as to permit Congress to prohibit defendants' conduct. Nor was the general explanatory instruction given to the jury adequate to this purpose.[4]

In any event, there was no conflict in the evidence as to the facts relevant to jurisdiction. The undisputed facts established that the necessary relationship to interstate

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may be drawn from them. Thus on the same business arrangements one case may be decided one way and another in a different way, as the jury may find that the arrangements did or did not affect commerce. . . . Surely these are matters that should be treated as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. When there is . . . in the case of the antitrust case a factual question as to details of the defendant's business activities, such questions could be put to the jury as special interrogatories, or a special verdict employed.

5 Moore's Federal Practice ¶ 38.36 [2.-2], at 300.

[4]The only relevant portion of the instructions reads (Tr. 1310):

The Sherman Act applies to parties whose acts are in the course or flow of commerce across state lines or whose acts, although local, substantially affect interstate trade and commerce. By substantial the law means not de minimus—not insignificant, an amount more than trifling. The amount of interstate trade involved, if substantial, is not material, since the Sherman Act brands as illegal the character of the restraint, not the amount of commerce affected.

commerce did exist. In these circumstances, it was error to submit the jurisdictional issue to the jury under Rule 49(a). *Wirtz v. La Fitte*, 326 F.2d 856, 858-60 (5th Cir. 1964); *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 902-03 (8th Cir. 1957); 9 Wright & Miller, *supra*, at 499. The jury's erroneous answer to the jurisdictional interrogatory should have been ignored. *Ratigan v. New York Central R.R., supra*, 291 F.2d at 554-55; *W. R. Grimshaw Co. v. Nevil C. Withrow Co., supra*, 248 F.2d at 902-05; *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 99-103 (1st Cir. 1932).

We need not stop to inquire whether retail sales of carpeting to Rossmoor Leisure World residents occurred "in" interstate commerce, for it is clear that defendants' anticompetitive conduct in connection with such sales necessarily had the "substantial economic effect" upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a "substantial" volume of carpeting from the states of manufacture to the Walnut Creek, California, area. *See Cartrade, Inc. v. Ford Dealers Advertising Ass'n, supra*, 446 F.2d at 292. Elimination of competition in these intrastate sales of goods produced in other states "inevitably" affected the interstate commerce in such goods: "When competition is reduced, prices increase and unit sales decrease," resulting in fewer purchases from out-of-state producers. *Burke v. Ford*, 389 U.S. 320, 322 (1967). By restricting plaintiff's participation in these retail transactions, and eventually excluding plaintiff entirely from this trade, defendants diverted interstate

shipments of carpeting from plaintiff to themselves, thus "interfer[ing] with the natural flow of interstate commerce." *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). The states in which the carpeting is manufactured as well as the State of California are concerned with the conditions under which carpeting is sold at retail to California residents. And the relationship between the elimination of competition in these retail sales of carpeting at Rossmoor Leisure World and the national interest in the distribution of carpeting in a free competitive economy is not so tenuous as to bar federal intervention, though the market monopolized in this instance was small. *Id.* at 213-14. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

Jurisdiction under the Sherman Act was therefore clearly present. In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose.

Appendix J

United States Court of Appeals
For the Ninth Circuit

No. 26,475

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellant,
vs.
Rossmoor Corporation, et al.,
Defendants-Appellees.

[Filed December 28, 1973]

ORDER

Before: BROWNING, DUNIWAY, and GOODWIN, Circuit Judges

The last two sentences of the opinion filed October 17, 1973, are stricken, and the following sentence added as a separate paragraph:

"The judgment is vacated and the cause remanded for further proceedings consistent with this opinion."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

Dated: December 28, 1973

Appendix K

United States District Court
For the Northern District of California

No. 45531

Louis Rosen d/b/a Walnut Creek Furniture,
Plaintiff,
vs.
Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants.

[Filed June 11, 1970]

JUDGMENT AND ORDER

The above entitled action having been tried before the undersigned Judge and a jury, commencing March 16, 1970; and the jury having answered the following stated interrogatories in the following ways:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

Yes Yes

No No

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertis-

ing carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes Yes

No ———

3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes ———

No No

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes Yes

No ———

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143
Goodwill	$22,738"

And

the jury, having, during its deliberations, submitted in writing to the court a question: "Are we to consider effect on interstate commerce based on total interstate commerce, or that portion of interstate commerce directly related to Walnut Creek Furniture?" and the court having inquired of counsel their respective views as to the appropriate answer to such question and the parties having stipulated on the record (reporter's partial transcript of

proceedings on Friday, March 27, 1970, page 27) that the answer should be: "Total commerce," the special interrogatory is deemed to have included this explanatory response to the jury for the purpose of the jury's answer to Interrogatory No. 3.

Prior to the entry of judgment the plaintiff filed a motion to enter judgment in his favor for the amount stated in Interrogatory No. 5. The defendants file their motion to enter a verdict in their favor.

It appearing that the jury's response to special Interrogatory No. 3 is a finding that is decisive in the case, that is, that the conspiracy which the jury found to exist under special interrogatories 1 and 2 did not have "a substantial effect on interstate commerce or the flow of interstate commerce" under the stipulated definition that the word "commerce" comprehended "total commerce,"

It Is Now, Therefore,

ORDERED that judgment be entered for the defendants, Rossmoor Corporation and Crestmark Carpet and Drapery Company.

The plaintiff having filed his motion for directed verdict prior to submission of the case to the jury, and having, following such submission, filed his motion for judgment notwithstanding the verdict or in the alternative for a new trial, and the parties having filed their briefs and having presented oral argument in the chambers of the undersigned, IT IS NOW ORDERED that the said motion for judgment notwithstanding the verdict and the motion for new trial are hereby overruled.

This 11th day of June, 1970.

/s/ Elbert P. Tuttle
United States Circuit Judge
Designated to sit as a
District Judge in the
Northern District of California

Appendix L

United States District Court
For the Northern District of California

No. 45,531

Louis Rosen, dba
Walnut Creek Furniture,
Plaintiff,

vs.

Rossmoor Corporation and Crestmark
Carpet and Drapery Company,
Defendants.

[Filed March 27, 1970, 5:27 p.m.]

JURY'S SPECIAL FINDING

The following questions are being submitted to you for your answer in order to aid the Court in reaching a decision in this matter.

You should recognize that your answers to these questions will be the basis for the Court's decision which will decide whether or not the plaintiff is entitled to recover or not from the defendants.

You are to answer the following interrogatories as applicable. Before any question may be answered, all 12 of the jurors must agree on the answer.

1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude

plaintiff from the carpet or other business in Rossmoor Leisure World?

Yes X

No .....

2. Did defendants enter into a common plea, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes X

No .....

3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes .....

No X

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes X

No .....

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143.00
Goodwill	22,738.00

Dated: March 27, 1970.

/s/ Richard A. Sims,
Foreman.

Appendix M

STATUTES INVOLVED

Section 4 of the Clayton Act October 14, 1914, Chap. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15; provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide in part, (Sherman Act, Sections 1 and 2, July 2, 1890, Chapter 647, Sections 1 and 2, 26 Stat. 209, as amended, 15 U.S.C., Sections 1, 2):

> "Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal. . . .
>
> "Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."